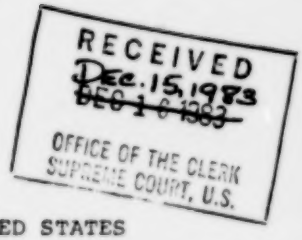
ORIGINAL

83-5954
NO.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FEDERAL CIRCUIT.

JOHN MURCKO, ESQ.
473 Jackson Street, 3d Flr.
San Francisco, CA. 94111
415-986-5591

Attorney for Petitioner

12pp

QUESTIONS PRESENTED

1. Whether an Article III court has juridiction to review a final decision of the Merit System Protection Board where the Board action violated Petitioner's constitutional rights to due process of law and the Department of the Navy violated its regulations in discharging Petitioner.

2. Whether the Department of the Navy and the Merit System Protection Board violated Petitioner's rights to due process of law in discharging Petitioner from employment in violation of its regulation and by imposing the burden of proof on him in violation of 5 U.S.C. 7701(c).

PARTIES TO THE PROCEEDING

The Petitioner is WAYNE LINDAHL. The Respondent is THE OFFICE OF PERSONNEL MANAGEMENT.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTES	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	17
APPENDIX A (Decision of Court of Appeal	1a
APPENDIX B (Decision of MSPB)	60a
APPENDIX C (Decision of OPM)	70a
APPENDIX D (5 U.S.C. 7701)	76a
APPENDIX E (5 U.S.C. 7703)	77a
APPENDIX F (5 U.S.C. 8347)	78a
APPENDIX G (5 C.F.R. 1201.56(a))	79a
APPENDIX H (FPM 831-1)	80a
APPENDIX I (Dept. of Navy-Sept. 4, 1979-advanced letter of involuntary disability separation)	84a
APPENDIX J (Petitioner's Application for Disability Retirement)	86a
APPENDIX K (Dept. of Navy-Sept. 17, 1979-letter of involuntary disability separation)	88a

TABLE OF AUTHORITIES

Cases:	Page
Abbott Laboratories v. Gardner, 387 U.S. 136	4, 11
Addington v. Texas, 441 U.S. 418 (1978)	9
American Federation of Musicians v. Wittstein, 379 U.S. 171 (1964)	16
American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902)	7
Avco Corp. v. Aero Lodge 135, 390 U.S. 557 (1968)	15
Barlow v. Collins, 397 U.S. 159 (1970)	11
Board of Regents v. Roth, 408 U.S. 564 (1972)	9
Campbell v. OPM, 694 F.2d 305 (3d Cir. 1982)	15
Chase v. OPM, 695 F.2d 790 (4th Cir. 1982)	15
Chavez v. OPM, 6 MSPB 343 (1981)	17
Dunlop v. Bachowski, 421 U.S. 560 (1979)	7
F.C.C. v. Broadcasting Service Organization, 337 U.S. 901 (1949)	6
Gaines v. United States, 158 Ct.Cl. 497, cert. denied 371 U.S. 936	12
Goldberg v. Kelly, 397 U.S. 254 (1970)	9
Gusik v. Schilder, 340 U.S. 128 (1950)	7
Harmon v. Brucker, 355 U.S. 579 (1953)	7
Johnson v. Robinson, 415 U.S. 361 (1974)	7
Lancellotti v. OPM, 704 F.2d 91 (3d Cir. 1983)	16
Lindahl v. OPM, 718 F.2d 391 (1983)	10, 15, 16
MacLean v. Huddlestone, ___U.S.___, 51 U.S.L.W. 4099 (1983)	9
McCard v. MSPB, 702 F.2d 978 (11th Cir. 1983)	11
Morgan v. OPM, 675 F.2d 196 (8th Cir. 1982)	15
Morton v. Mancuri, 417 U.S. 535 (1974)	14, 15
Morton v. Ruiz, 415 U.s. 199 (1973)	17
Northeastern National Bank v. United States, 387 U.S. 213 (1966)	15
Parodi v. MSPB, 702 F.2d 743	12, 13, 16
Pitzak v. OPM, 710 F.2d 1476 (10th Cir. 1983)	11, 14, 16
Reaves v. Ainsworth, 219 U.S. 296 (1911)	7

Cases: Page

Rusk v. Cort, 369 U.S. 3-7 (1962) 11

Santosky v. Kramer, 455 U.S. 745 (1982) 9

Schlesinger v. Councilman, 420 U.S. 738 (1975) 6, 10

Scroggins v. United States, 397 F.2d 295 (Ct.Cl.) cert. denied 393 U.S. 952 (1968) 11, 12, 13, 15, 16

S.E.C. v. Otis and Company, 338 U.S. 843 (1949) 6

Service v. Dulles, 354 U.S. 363 (1957) 8

Shaughnessy v. Pedreiro, 349 U.S. 48 (1954) 11

Turner v. OPM, 707 F.2d 1499 (D.C.Cir. 1983) 13, 16

Udall v. Tallman, 380 U.S. 1 (1965) 14

United States v. Clark, 445 U.S. 23 (1980) 16

United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954) 7

United States v. Interstate Commerce Communications, 337 U.S. 426 (1948) 11

Vitorelli v. Seaton, 359 U.S. 535 (1959) 8

Woodby v. INS, 385 U.S. 276 (1966) 9

Statutes and Regulations

5 U.S.C. 724 12

5 U.S.C. 2266 12

5 U.S.C.A. 7701 2, 3, 5, 8, 9

5 U.S.C.A. 7703 2, 5, 11, 12, 13, 14, 15, 16

5 U.S.C.A. 8347 2, 4, 5, 10, 11, 12, 13, 14, 15, 17

10 U.S.C. 876 6

28 U.S.C. 1254(1) 1

38 U.S.C. 211 7, 14

Public Law 95-454, 92 Stat. 1111 6

Public Law 97-164, 96 Stat. 25 6

5 C.F.R. 1201.56 2, 3, 8, 9

FPM 831-1 2, 8

Miscellaneous	Page
H.R. No. 312, 95th Cong. 2d Session	12
H.R. No. 1080, 96 Cong. 2d Session 2, 3, 4, 8	13
S.R. No. 969, 95th Cong. 2d Session 62	12
S.R. No. 1004, 96th Cong. 2d Session 2	13
Supreme Court Rules 17.1	6, 15

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FEDERAL CIRCUIT.

John Murcko, Esq., on behalf of WAYNE LINDAHL, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Federal Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeal (majority, two concurring and two dissenting opinions)(Appendix A, 1a to 59a) is reported at 718 F.2d 391 (Federal Cir. 1983). The decision of the Merit System Protection Board is unreported (Appen. B, 60a- 69a). The opinions of the OFFICE OF PERSONAL MANAGEMENT are also unreported (Appen. C 70a-75a).

JURISDICTION

The judgment of the Court of Appeal was entered on September 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

The authority relied upon include the Fifth Amendment, 5 U.S.C. 7701, 5 U.S.C. 7703, 5 U.S.C. 8347, 5 C.F.R. 1201.56 and FPM 831-1. (Appen. D, E, F. G and H.)

STATEMENT

Petitioner LINDAHL worked as a civilian employee for the Deparment of the Navy at Mare Island Naval Support Activity from 1968 to 1979. He commenced working as a welder and in 1972 changed his position to a security guard. Beginning in September, 1975, LINDAHL developed bronchitis. In December 1977, his physician, Dr. B. Allen, recommended the he retire on medical disability due to total and permanent disability caused by severe and recurring bronchitis. His condition was exasperated by the sandblasting, spraying and solvents used at the Naval Station in repairing and painting of naval vessels.[1/] (R. I. 47, 75-8, R. II 14-21)

On February 13, 1978 and April 10, 1978 LINDAHL was examined by Dr. J. P. Williams of the Naval Support Activity, and Dr. G. B. Levine of the U.S. Civil Service Commission. Both diagnosed him as having acute and chronic bronchitis and stated that he was disabled for his position. (R.I. 125, 134)

LINDAHL was placed on limited duty status on June 1979. On September 4, 1979 LINDAHL was given advanced notice by the Department of the Navy that he would be separated due to disability caused by his bronchial condition. (R.I. 35, Enclosure 1) On September 5, 1979, LINDAHL filed with the Department of the Navy the form requesting that he

---

1/ R.I. or R. II. refers to the Record of the Merit System Protection Board filed in the Court of Appeals, Part I or Part II and includes Enclosures 1 to 8.

be retired due to his bronchial disability. (R.I 89, Enclosure 3)

On September 21, 1979, the Commanding Officer of the Naval Support Activity notified LINDAHL that he would be separated as a security officer on October 5, 1979. (R.I. 33, Enclosure 3) This was done in violation of Federal Personnel Manual, Section 831-1 which requires that the Office of Personnel Management (hereafter OPM) retain an employee in active duty status pending decision on an application for disability retirement. (See App. A, 37a; C, 70 a; and H, 80a-83a.)

On April 8, 1980 LINDHAHL was notified by OPM that his application for disability retirement was disapproved (R.I 38, App. C, 70a-71a, App. C). On December 4, 1980 OPM denied the request for reconsideration (R.I 7-9; App. C 72a-74a).

An application was filed with the Merit System Protection Board (hereafter MSPB) on January 12, 1981. A hearing was held on March 20, 1981 during which the MSPB hearing officer placed the burden of proof on the Petitioner in violation of Section 7701(c) and 5 C.F.R. 1201.56(a). (See R.I 160-9, App. A, 37a, 40a, App. B.) No witnesses ever appeared for OPM or the Department of the Navy. The only witness and evidence were presented by Petitioner. (R.I passim, R.II, passim.)

The MSPB recognized that 5 U.S.C. 7701(c)[2/] and the governing regulation of the OPM, 5 C.F.R. 1201.56(a)(iii), provides "that in appeals before the MSPB, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence...." (App. B, 61a)

2/ All references to 5 U.S.C. will be by "Section."

However, the MSPB went on to hold that the burden is on the Petitioner to prove by a preponderance of evidence that he is entitled to the disability retirement since he has a better knowledge of his condition (App. B, 62a). The MSPB ruled that LINDAHL was not disabled to the extent required for an annuity because he was not totally disabled for useful and efficient service. (App. B, 68a)

LINDAHL filed an appeal in the Court of Claims on June 10, 1981. On October 1, 1982 the case was transferred to the Court of Appeal for the federal circuit pursuant to the Federal Courts Improvement Act (FCIA). The government moved to dismiss on the grounds that judicial review is precluded by Section 8347(c). (App. A, 2a)

The Court of Appeals granted the government's Motion to Dismiss for lack of jurisdiction. The court held in banc (majority decision of only five of eleven judges and two limited concurring opinions) 8347(c) precluded judicial review of all decisions of physical disability retirement of the MSPB, other than those involving forced retirement for mental disability. (App. A, 8a)

The Court never addressed the issue whether it can review decisions of the MSPB where the petition alleges that the actions of the agency in separating an employee violated their own regulations and the actions of the hearing officer in allocating the burden of proof violated agency regulations and specific statutes. (App. A, 37a, 40a)

Instead, the Court held that LINDAHL is only entitled to judicial review of MSPB disability decisions if he cites "constitutional infirmity in the legislation governing disability retirement or in the classifications mode in the legislation." (App. A, 8a)

Next, the Court of Appeal ruled that it is not bound by the Supreme Court decision in Abbott Laboratories v. Gardner, 387 U.S. 136, 140-141 (1967) and its progency that

there is a presumption of judicial review over agency action. It based its ruling on the belief that under Section 8347(c), MSPB action is final. (App. A, 13a) It overruled twenty-five years of precedents allowing judicial review in this area. (App. A, 11a)

Next the Court ruled that Section 7703(a)(1) which provides for appeals for all MSPB decisions is not applicable. And that appeals of MSPB decisions on physical disability retirement claims are not appeable by claimants or by the OPM. (App. A, 19a-20a)

There were two concurring opinions. One by Circuit Judge NIchols agreed with the majority, but stated that "my conclusion is that preclusion of judicial review is never absolute in life." (App. A, 38a) The other, by Circuit Judge Nies, stated that he joined the majority opinion, but that not all aspects of a disability claim are precluded from judicial review. (App. A, 40a) Four other Circuit Judges dissented in two separate opinions. Their position was that in 1980, judicial review of physical disability was limited but not eliminated. When Congress amended Section 8347, it expanded judicial review in the area of involuntary mental disability retirement. Congress knew that limited review of MSPB decisions was available prior to the amendment, the OPM Director had told Congress that the prior standard would continue for non-mental disability cases and Congress did not change the wording of the finality clause. Therefore, Congress "intended to preserve that remedy." App. A, 43a-44a)

The dissent also stated that Section 7703(a)(1) provides for review of all decisions of the MSPB except for those of discrimination. Therefore, Section 7703 controls Section 8347(c). And finally Section 7701 covers any action appealable to the MSPB and all Section 7701 actions are reviewable by the court. App. A, 47a-58a.

REASONS FOR GRANTING THE PETITION

The Court of Appeal has held that the statute governing judicial review of MSPB decisions for physical disability retirement precludes any judicial review. This unwarranted action presents a misconstruction of a congressional amendment to the Federal Courts Improvement Act of 1982 (FCIA), Public Law No. 97-164, 96 Stat. 25; and the Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, 92 Stat. 1111.

It is inconsistent with this Court's decisions that the judiciary must review agency action to insure compliance with an agency's procedural and substantive framework. It is further inconsistent with this Court's decisions recognizing a presumption that agency action is reviewable. Because the Court of Appeal has incorrectly decided an issue of significant importance to the members of the executive agency, and in contradiction to express agency policy, review by this Court is necessary.

1. This Court should grant certiorari to the Court of Appeal because the decision clearly conflicts with prior Supreme Court decisions. F.C.C. v. Broadcasting Service Organization, 337 U.S. 901 (1949); S.E.C. v. Otis and Company, 338 U.S. 843 (1949). Supreme Court Rules, Rule 17.1(c).

This Court in Schlesinger v. Councilman, 420 U.S. 738 (1975) held that a federal statute (10 U.S.C. 876) which provided that review of court-martial sentences by military tribunals is "final and conclusive" and that "all action taken pursuant to these proceedings are binding upon all...courts...of the United States" did not preclude judicial

review by Article III courts. They can intervene, by way of habeas corpus, injunction or back pay suits where the action taken at the court-martial level was unconstitutional or otherwise void.

Likewise, in Gusik v. Schilder, 340 U.S. 128 (1950), this Court held that the finality clause of Article 58 did not prevent review of court-martials by federal courts where there are due process violations. "We read the finality clause of Article 58 as doing no more than describing the terminal point for proceedings within the court-martial system." 340 U.S. at 132.

And, in Johnson v. Robinson, 415 U.S. 361 (1974) this Court also held that the finality language of 38 U.S.C. 211 did not bar judicial consideration of the constitutional provisions of the law concerning veterans benefits.

There is a recognized duty of Article III courts to require a government agency to follow the procedural and substantive framework established in the statute and the regulation that is administered by the agency. The courts have the duty to prevent the agency from violating constitutional rights. Dunlop v. Bachowski, 421 U.S. 560, 567-568 (1972)

Likewise, this Court has consitently held that where a federal executive official has exceeded its statutory authority, the court will review the action to determine whether the official was acting within the scope of its lawful powers. American School of Magnetic Hearing v. McAnnulty, 187 U.S. 94 (1902); Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); Harmon v. Brucker, 355 U.S. 579 (1953).

And administrative action of the executive department in violation of its own regulations establishing procedures for ahearing and review are invalid. United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954);

Service v. Dulles, 354 U.S. 363, 388 (1957). The head of an executive department must comply with its own procedural regulations in dismissing an employee and failure to follow its own regulations amounts to a due process violation. Vitarelli v. Seaton, 359 U.S. 535 (1959).

Here the Court of Appeal failed to follow the concept of review of administrative action of the OPM and MSPB which was in violation of their own regulations and statutory provisions. The Petitioner LINDAHL raised two issues of constitutional dimension which were ignored in the majority decision. First, Petitioner raised the issue that the Department of the Navy violated its own regulations under FPM 831-1, S 10-10(a)(6), when it separated him. (App. A, 37a, 40a) "The agency is required to retain an employee in an active duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement...." (App. H, 83a) The agency here initiated the disability separation on September 4, 1979. (App. I, 84a) It separated LINDAHL on October 5, 1979. (App. K, 88a) The OPM final decision was issued on December 4, 1980. (App. C, 72a-74a)

The Court of Appeal in its ruling stated "A facile formula based on fear of faceless functionaries would be such a grant, for the court would have to exercise jurisdiction to determine whether legal or procedural error occurred." (App. A, 15a)

Next, LINDAHL raised the issue in both the MSPB and the Court of Appeal that the MSPB incorrectly placed the burden of proof upon him instead of the OPM. (App. A, 38a, 40a; App. B, 61a-62a) Both Section 7701(c)(1)(B) and 5 C.F.R. 1201.56(a)(iii) places the burden of proving that the agency's decision is supported by a preponderance of the evidence on the agency. The OPM never even appeared at the MSPB hearing. (App. B, 61a-62a) But the MSPB placed the burden of proof on LINDAHL. Ibid.

It is well established the procedural due process prohibits the deprivation of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972) The extent of protection to be afforded to persons by procedural due process is greatly influenced by the grevious loss he (she) may suffer. Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970).

The concept of the burden of proof and the standard of proof is a concept that is embodied in the Fifth Amendment's Due Process Clause in civil cases. Santosky v. Kramer, 455 U.S. 745, 754 (1982); Woodby v. INS, 385 U.S. 276, 285 (1966). The function of the burden and standard of proof in civil cases is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Addington v. Texas, 441 U.S. 418, 423 (1978). This reflects how the risk of error should be distributed between the litigants and the weight of the private and public interests involved. MacLean v. Huddlestone, ___U.S.___, 51 U.S.L.W. 4099, 4103 (1983).

Where the government has the burden of proof in civil matters, it must support its allegations by "clear, unequivocal and convincing evidence." Woodby v. INS, 385 U.S. 276, 285.

By transferring the burden from the OPM to the employee, the risk of an erroneous deprivation of private interests is increased to the employee. He (she) must prove that he is disabled when the opinion concerning the ability to perform the job is usually in the hands of experts or of his superiors. This is especially true where, as here, the disability termination was involuntary. The risk of error is decreased where the burden of proof is on the OPM. It has more expertise and resources and it has been so designated by Congress in Section 7701(c)(1)(B) and OPM regulations in 5 C.F.R. 1201.56(a)(iii).

The MSPB violated LINDAHL's due process rights by placing the burden of proof upon him. It took the OPM out of the procedural morass. The risks were increased and it caused an incorrect deprivation of private interests.

This fundamental procedural issue is a constitutional issue that the Federal Circuit must hear and consider.

But the Court of Appeal stated in its opinion that LINDAHL can only raise constitutional questions where it involves "infirmity in the legislation governing disability retirement or in the classification made in that legislation." (App. A, 8a) And that "Allegation of procedural errors are ...a matter for investigation and legislation by the Congress, not the courts." (App. A, 15a-16a)

This decision stands in contravention to over eighty years of decisions of this Court which allow review of executive action taken in excess of the statutory provisions or in violation of the regulations. Beginning with McAnnulty and up until Schlesigner, action of the executive branch in violation of constitutional rights of the petitioner is subject to judicial review. The finality language of Section 8347(c) does not prohibit such review. It only limits the review. And Congress has never indicated that it has prohibited review for constitutional or due process violations in this area.

Even the concurring opinion in LINDAHL v. OPM recognizes the error of the majority opinion when it states, "We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective." (App. A, 39a)

The majority did extend the limitation on review to include procedural errors in violation of regulations, statutes and the constitution. The decision contravenes numerous Court decisions.

2. There is a general presumption stated by this Court that agency action is subject to judicial review. And while the scope of judicial review may be limited by statute, judicial review will be precluded only if there is a clear and convincing congressional intent to review such actions. Barlow v. Collins, 397 U.S. 159, 166-167 (1970); Rusk v. Cort, 369 U.S. 367, 379-380 (1962).

"The Adminstrative Procedure Act provides specifically not only for review of agency action made reviewable by statute but also for review of final agency action for which there is no adequate remedy at law." Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The generous review provisions of the Act must be given a "hospitable interpretation." Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1954); United States v. Interstate Commerce Communications, 337 U.S. 426, 433 (1948).

The Court of Appeal refused to follow this judicial presumption. That presumption is embodied in Section 7703 which provides that "Any employee...aggrieved by a final order of the MSPB may obtain judicial review of the order...." It found to the contrary that there is no presumption and that Section 7703 does not apply. Instead, it found that Congress never intended judicial review in this area of physical disability claims. (App. A, 8a)

The courts have allowed review of agency decisions under Section 7703(c) based on the substantial evidence test. And the courts reviewing agency decisions under Section 8347(c) as construed by Scroggins[3/] allow review of legal and procedural errors, but do not permit a re-examination of the evidentiary basis for an agency's ruling. McCard v. MSPB, 702 F.2d 978 (11th Cir. 1983); Pitzak v. OPM, 710 F.2d 1476, 1478 (10th Cir. 1983).

3/ Scroggins v. U.S., 397 F.2d 295 (Ct. Cl.)

This construction and not that of the Court of Appeal below overruling Scroggins, which limits rather than bars judicial review, is more consistent with the presumption favoring judicial review of agency determination. Parodi v. MSPB, 702 F.2d 743, 746.

But even more important, there was no clear and convincing evidence of a contrary legislative intent against judicial review for this ruling below. The Congressional history of the FCIA showed that Congress provided for a grant of review of all MSPB decisions under Section 7703. It did not exclude any except for those of discrimination. Congress gave plenary power to the Federal Circuit to review. The Senate Report states that Section 7703 "applies to judicial review of all final orders on decisions of this Board...." S.Rep.No. 969, 95th Cong. 2d Sess. 62, reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 2784. And the House Report on Section 7703 stated that the federal court of appeal has "jurisdiction of any appeal from a final order or final decision of the Merit System Protection Board." H.R.Rep. No. 312 at 18 (App. A, 54a).

The finality clause of Section 8347(c) regarding disability has been in existence since 1948.[4/] The Court of Claims has consistently interpreted the finality clause to limit review of administrative decisions only "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some error going to the heart of the administrative process." Gaines v. United States, 158 Ct.Cl. 497, 502, cert. denied 371 U.S. 936 (1962); Scroggin v. United States, 397 F.2d 295 (Ct. Cl.) cert. denied, 393 U.S. 952 (1968). The Court of Claims has consistently interpreted the finality clause of 8347(c) to bar review only of any factual findings of the

---

4/ Originally finality was in Section 724 and later in Section 2266.

Civil SErvice Commission (now OPM). Turner v. OPM, 707 F.2d 1499, 1502 (D.C. Cir. 1983)(emphasis added).

The "Scroggins formula" was the law in 1980 when Congress passed the amendment to 8347. (App. A, 43a). The purpose of the amendment was to prevent the abuses of involuntary (agency initiated disability retirement determination based on an emplcyee's mental condition. It was to be subject to review under Section 7703 (review of law and facts) rather than the narrower provisions of 8347 (review of law only). This was to prevent retirement of unpopular employees. See H.R. No. 1080, 96th Cong. 2nd Sess. 2-3 (1980) 126 Cong. Rec. H 5023 (June 16, 1980); S.R. No. 1004, 96th Cong. 2d Sess. 2; 1980 U.S. Cong. & Admin. News 5986.

The legislation originated in the House Committee on Post Office and Civil Service, And the House Report stated that the method to curb these abuses was to expand the scope of review beyond the "Scroggins formula" for mental disability cases only to allow review of the substantial evidence under 7703. H.Rep. No. 1080, 96th Cong., 2nd Sess. 4 (1980); Parodi v. MSPB, 702 F.2d 743, 747-8 (9th Cir. 1982).

And further the legislative history of the 1980 Amendment indicates that Congress amended the statute based, in part, on OPM's representation that Section 8347(c) already permitted limited judicial review of all disability proceedings. Alan K. Campbell, the Director of OPM, wrote to Congress on May 14, 1980 stating:

> We believe it is reasonable and proper to restrict expanded judicial review to involuntary disability retirements....It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination. (Emphasis added.)
>
> H.R. NO. 1080 at 8; S.R. 96-1004. Parodi v. MSPB, 690 F.2d at 748.

Far more deference is due to the agency's contemporaneous explanation of the effect of a statute then its position before the Court of Appeal during litigation. Udall v. Tallman, 380 U.S. 1, 16 (1965).

Thus, the history and wording of the 1980 amendment shows that Congress intended to expand judicial review for involuntary disability retirement of an employee's mental status. Congress did not intend to bar all judicial review of disability determinations. So the Court of Appeals below was incorrect in its position that there was clear and convincing evidence of congressional intent to bar review. The opposite is true.

Had Congress intended to prevent judicial review of factual and legal questions, it could have done so as it did in 38 U.S.C. 211(a). Prior to its 1970 Amendment, 38 U.S.C. 211 so provided.

Thus, the conclusion is inescapable that the Court of Appeal ignored and refused to follow the judicial presumption favoring judicial review of agency actions. But it failed even more so by not showing the clear and convincing evidence that Congress intended to bar judicial review of agency actions in the area of physical disability retirements. It buried itself in Section 8347(c) and ignored the legislative history, prior precedents and Section 7703.

3. A third basis for review of the Court of Appeals decision is the law of this Court that provides that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary to regard each as effective. Morton v. Mancuri, 417 U.S. 535, 551 (1974); Pitzak v. OPM, 710 F.2d 1476, 1479.

The Court of Appeal held that it has no jurisdiction under Section 7703 to review MSPB decisions on physical disability retirement claims. It believes that Section 8347(c)(d) bars such review. (App. A, 8a) The majority decision concentrates on Section 8347 and falls victim to relativism. It fails to recognize the broad authority of the federal circuit to review as set out in Section 7703(a)(1) and sets

itself beyond that section. Likewise, it prohibits OPM from petitioning for review of any MSPB decision despite the express language of 7703(d). It slams the courthouse door on individuals and OPM alike in Section 8347 cases involving physical disability retirement claims.

But this ruling is contrary to the Morton rule. The anomaly created by the majority is obviated by regarding both Section 7703(a)(1) and Section 8347(c) as effective. Both statutes are capable of co-existence. This intent of Congress is to give full review of mental disability retirement cases arising under Sections 7703 and 8347(d) while foreclosing only judicial review of the sufficiency of the evidence under 8347(c) in physical disability retirement cases. This will preserve the duty of the courts to require an executive agency to follow the statutory and regulatory framework of the agency.

4. An irreconcilable conflict between different court of appeals on the same matter of general law is a basis for review by this Court. Supreme Court Rules, Rule 17.1(a). Avco Corp. v. Aero Lodge #135, 390 U.S. 557, 559 (1968); Northeastern National Bank v. United States, 387 U.S. 213, 217 (1966).

The Court of Appeal below made two rulings that are in conflict with four other circuits. First, it ruled that the finality clause of Section 8347(c) prohibits the exercise of all federal court jurisdiction to review any physical disability retirement claims. (App. A, 8a)

Second, it ruled that the "Scroggin formula" on review of any decision of the OPM is invalid. Thus, review of OPM decisions for procedural or constitutional error is precluded. (App. A, 11a)

The following decisions take the same position as LINDAHL: Morgan v. OPM, 675 F.2d 196 (8th Cir. 1982); Chase v. OPM, 695 F.2d 790 (4th Cir. 1982); Campbell v. OPM, 694 F.2d 305 (3d Cir. 1982).

But the following circuits have ruled (1) that federal court of appeals have limited jurisdiction to review denials of physical disability retirement claims and (2) that

the "Scroggin formula" is the correct rule of judicial review. Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982); McCord v. MSPB, 702 F.2d 978 (11th Cir. 1983); Turner v. OPM, 707 F.2d 1499 (D.C. Cir. 1983); Pitzak v. OPM, 710 F.2d 1476 (10th Cir. 1983); Lancellotti v. OPM, 704 F.2d 91 (3d Cir. 1983). (App. A, 9a-10a)

Although Congress under the FCIA has vested exclusive jurisdiction in the Federal Circuit Court of Appeals since 1982 over MSPB decisions, there are two good reasons for granting certiorari. The "Scroggin formula" is broader than just disability claims. It applies to all administrative decisions. Turner v. OPM, 707 F.2d at 1502. In fact this Supreme Court in United States v. Clark, 445 U.S. 23, 34 (1980) stated "Because we hold that the Civil Service Retirement Act expressly allows the appellee's children to receive survivor's annuities, there is no question that the Court of Claims below had both jurisdiction to entertain their claims and to grant recovery."

Thus, five circuits will still be following the "Scroggins formula" to adjudicate administrative claims, while four others will not.

Second, cases still pending before the circuits filed prior to 1982 must be resolved and they will follow either Parodi or Morgan. The conflict must be resolved.

5. This issue of the jurisdiction of the Federal Circuit in disability cases is the first interpretation of that court's jurisdiction. And it is of considerable importance to the statutory scheme intended under the FCIA. The interpretation of its jurisdiction is an "important one of first impression" and must be resolved by this Court. American Federation of Musicians v. Wittstein, 379 U.S. 171, 175 (1964).

Congress gave the Federal Circuit plenary authority under Section 7703 over MSPB decisions. With Lindahl, the Court has rejected that authority over federal employees. They are left to the caprice of the agency without judicial review. This was clearly not intended by Congress. This

Court must resolve this important issue.

Next, the Federal Circuit decision below is at war with the well-established construction of the statute by the administrative agents charged with its enforcement. Morton v. Ruiz, 415 U.S. 199, 201-2 (1973).

The Director of OPM has stated to Congress that Section 8347(c) and (d) was meant to expand review of the federal courts on mental disability but to allow review to remain on legal issues for physical disability claims. (App. A, 43a)

Likewise, the MSPB has ruled that Section 8347(c) is only a restriction on judicial review in disability determinations and is not a ban on such review. Chavez v. OPM, 6 MSPB 343 (1981).

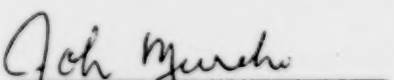
Thus, this is an important issue on review of OPM and MSPB disability rulings and this Court should issue certiorari to resolve this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED: December 12, 1983

Respectfully submitted,



JOHN MURCKO
Attorney for Petitioner
WAYNE LINDAHL

RECEIVED
DEC 16 1983
OFFICE OF THE CLERK
SUPREME COURT U.S.

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITIONER'S APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT.

JOHN MURCKO, ESQ.
473 Jackson Street
3d Floor
San Francisco, CA. 94111
415-986-5591

Attorney for Petitioner

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL Petitioner, v. OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	Appeal No. 39-81

DECIDED: September 22, 1983

Before the court In Banc.

MARKEY, Chief Judge.

Petitioner Lindahl appeals from a decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of his request for a disability annuity. We order dismissal of the appeal for lack of jurisdiction.

Background

On September 5, 1978, Lindahl elected to retire, on the basis of disability, from his civilian employment with the United States Navy. On September 25, 1979, the Navy notified him that he would be separated for physical disability. He accepted the disability separation but claimed an annuity. On March 21, 1980, OPM's denial of the annuity was affirmed in a comprehensive opinion, No. SF 831L8110492, in which MSPB pointed out that the degree of disability required for voluntary separation is less than that required for entitlement

APPENDIX A

to an annuity, and that Lindahl was not disabled to the extent required for an annuity. Lindahl filed an appeal in the Court of Claims, on June 10, 1981, and the case was transferred to this court on 1 October 1982 in accord with the Federal Courts Improvement Act (FCIA), Pub. L. No. 97-164, 96 Stat. 25.

The government moved to dismiss, citing as alternate grounds: (1) judicial review is precluded by 5 U.S.C. § 8347(c); (2) jurisdiction is lacking under 5 U.S.C. § 7703 because Lindahl is not an "employee". Because we dismiss on (1), we need not and do not in this case determine the meaning or scope of the word "employee" in § 7703.

Opinion

Judicial Review is Precluded by 5 U.S.C. § 8347(c)

Congress established a retirement system for federal employees. 5 U.S.C. § 8337. The right to retirement per se, or to a retirement annuity is not founded in the Constitution. The rights created having their genesis in a statute, Congress was at liberty, Dismuke v. United States, 297 U.S. 167, 172 (1936), to establish a statutory scheme in which the decisions governing eligibility for disability retirement and annuities would be made entirely within the administrative process. Congress was further at liberty to amend that scheme to provide a review step within the administrative process, and to provide for judicial review of one type of such decisions.

EDITOR'S NOTE

PAGES 3a - END WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Congress did precisely that, the amended statutory scheme being set forth in the current statute at 5 U.S.C. § 8347(c) and (d):

> (c) The Office [OPM] shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d) (1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(d) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

The emphasized matter is that added in 1980 by Pub. L. No. 96-500, 94 Stat. 2696.

The parties' briefs and arguments do not note that the OPM decision in this case was rendered before the January 1, 1981 effective date of the 1980 amendment. When the OPM

decision was rendered, sections 8347(c) and (d) were as above quoted, but without the emphasized matter. We are required, absent manifest injustice, to apply the law as it exists at the time of our decision. Bell v. New Jersey and Pennsylvania, 103 S. Ct. 2187, 2199 (1983) (White, J., concurring). In the present case, no such manifest injustice would result, which may account for the parties' discussion of the statute as it was amended in 1980.

We decide here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an MSPB decision affirming the denial of a claim for annuity following a voluntary physical disability retirement, a decision reached by MSPB under the authority provided it in § 8347(d)(1). In such cases, the initial decision is that of the employee who has elected to retire, and who has asserted disability as the reason, and who has then sought an annuity.

Lindahl here seeks judicial review of MSPB's decision on the "question" of his disability as entitling him to an annuity. The so-called "finality clause" in § 8347(c) states unequivocally and unambiguously that administrative decisions on questions of disability "are final and conclusive and are not subject to review". It is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence.

The finality clause first appeared, in relation to survivorship benefits, in 5 U.S.C. § 724, in 1948. No

legislative history existed in relation to that section, and none is needed in view of its continued unambiguous nature. In 1956, as codified at 5 U.S.C. § 2266(c), the preclusion of review was extended to include disability cases.

Subsequent legislative enactments and court decisions dealing with federal employee retirement, as well as those dealing with other rights of federal employees, have resulted in substantial confusion respecting the limited question before us.

Respecting retirement, Congress passed in 1978 an amendment to § 8347, Pub. L. No. 95-454, 92 Stat. 1111, providing for review by MSPB of OPM disability decisions. § 8347(d). By that amendment, Congress continued to limit the enforcement of voluntary disability retirement rights to the administrative process. It nonetheless provided, to an individual dissatisfied with an OPM decision, an appeal to a quasi-judicial tribunal independent of OPM and affording appropriate administrative review procedures.

In the 1978 amendment Congress let stand the provision in § 8347(b) that OPM "shall adjudicate all claims under this chapter". Congress did not specifically spell out in the statute that § 8347(d) was an exception to the finality clause in § 8347(c).

The history of what Congress did, up to and including its adoption of the 1980 amendment indicates its present intent to deny judicial review of MSPB decisions on questions of

disability, other than those involved when an agency forces retirement for mental disability. By the language it selected in constructing § 8347, Congress began with a total limitation to the administrative process, stopping the process with the decision by the Civil Service Commission (now OPM). In 1978, Congress provided for review of OPM decisions, still within the administrative process, by MSPB. In reenacting § 8347(c) without change, Congress thus provided that the review process of § 8347(d) ended at the MSPB level. Until 1980, Congress had at no time specifically granted jurisdiction to any court to review any decision, by either OPM or MSPB, on questions of disability and dependency. Then, in 1980, for the first time, Congress provided for judicial review, but only to individuals forced to retire at the instance of an agency on the basis of the individual's alleged mental condition. In that 1980 amendment, Congress clarified the relationship between § 8347(c) and (d) by inserting in the former "Except to the extent provided under subsection (d)".

Thus, the plain language of the statute, with which we must begin, Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979), expressly precludes review beyond the administrative process, i.e., it precludes judicial review, of denials of voluntary disability retirement annuity claims such as Lindahl's. An express statutory provision that certain decisions of an adminstrative agency "are final and conclusive and are not subject to review" should not be interpreted as

though it said such decisions "are not final and are not conclusive and are subject to some judicial review". Certainly that interpretation should not be adopted after Congress has in the same statute provided that other decisions are subject to review. To so read the review-precluding language of the present statute would appear not a judicial act of interpretation but a legislative act of repeal.

Whatever may be said of the finality clause in the abstract, the subsequent actions of the Congress providing specific and particular exceptions to that clause, one administrative, the other judicial, provide compelling evidence of its intent to preclude judicial review of MSPB decisions on voluntary disability retirement claims. Congress having provided for administrative review in § 8347(d)(1), the express exclusion of review in § 8347(c) can relate only to judicial review.

Where, as here, Congress has repeatedly revisited the statute, and where, as here, those self-reviews of its earlier handiwork included two in which it has spelled out specific exceptions to its total preclusion of review, and the specific forums for each, it is not within the province of a court to create additional exceptions. Congress has addressed the question of exceptions, has in the 1980 amendment created legislation without ambiguity or inconsistency, has assured uniformity in the retirement law by making certain discrete disability claims decidable exclusively by MSPB and others

exclusively reviewable in this court, has dealt with all classes of disability annuity claimants, and has provided specific means through which each class may pursue claims for annuity. No basis exists on which this court could exercise an assumed power to create some new class of annuity claimants or to design some new procedure that would include a right of such claimants to appeal to this court.

Lindahl is not within the class of claimants to which the right to judicial review of MSPB disability decisions is provided by § 8347(d)(2). He cites no constitutional infirmity in the legislation governing disability retirement or in the classifications made in that legislation.

This court's grant of jurisdiction to review MSPB decisions is broad but not unlimited. Among the limitations on that grant is necessarily a statute expressly excluding review of certain decisions. Such a statute is spelled out in 5 U.S.C. § 8347(c) and (d). The government's motion to dismiss must therefore be granted.[1/]

Asserted Bases For Jurisdiction

As above indicated, legislation creating rights of federal employees, and the legislative history of that

1/ Lindahl suggests that 28 U.S.C. § 1491 may supply jurisdiction in the Claims Court to determine the question of whether his disability entitles him to an annuity following his voluntary disability retirement, the claim having been denied by OPM and by MSPB after review under § 8347(d)(1). Jurisdiction of the Claims Court being a matter for its decision in the first instance, we need not and do not here respond to Lindahl's suggestion.

legislation, have clouded the search for clarity that is an integral part of the judicial process. Equally well intentioned and careful courts have reached differing conclusions respecting what the intent of Congress was when it enacted and amended § 8347. Intent of Congress being the touchstone in cases of statutory interpretation, we have been cited to a number of bases upon which it might be held that Congress intended this court to exercise a jurisdiction to review MSPB decisions on voluntary disability retirement annuity claims.

(a) The Scroggins Line of Cases

In Scroggins v. United States, 397 F.2d 295, 297 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968), it was said that the finality clause of § 8347(c) meant that "at best, a court can set aside the Commissioner's determination only 'when there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination'".

Though the "procedural departure, legislation misconstruction, or like error" quotation was from Gaines v. United States, 158 Ct. Cl. 497, 502, cert. denied 371 U.S. 936 (1962), it has been labeled the "Scroggins formula", and referred to in: Polos v. United States, 621 F.2d 385, 391-92 (Ct. Cl. 1980); Fancher v. United States, 588 F.2d 803, 806 (Ct. Cl. 1978); Allen v. United States, 571 F.2d 14, 17 (Ct.

Cl. 1978); McFarland v. United States, 517 F.2d 938, 942-43 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); McGlasson v. United States, 397 F.2d 303, 307 (Ct. Cl. 1968).

The "Scroggins formula", though quoted from Gaines in Scroggins, had its genesis in Smith v. Dulles, 236 F.2d 739, 742 (D.C. Cir. 1956), cert. denied, 352 U.S. 955 (1956). Smith was one of three cases decided on the same day and denying reinstatement, back pay, and declaratory judgments. A footnote in Smith traces the "formula" back to Powell v. Brannan, 196 F.2d 871, 873 (D.C. Cir. 1952), a reduction-in-force case having no relation whatever to retirement. (See reference to "decisional leapfrogging" in Griswold, The Judicial Process, 28 Rec. A. B. City N.Y. 14, 24-25 (1973)).

Smith, Gaines, Scroggins, McGlasson, and McFarland dealt with forced retirements for mental conditions. Pancher, Allen, and Polos dealt with forced retirement for physical disability. No case dealt with a voluntary retirement claim for annuity, and in no case (except in Allen, overruled in Polos) did application of the "Scroggins formula" result in reversal.

We face here no settled case law. Sections 8347(c) and (d), and the "Scroggins formula" have appeared in the opinions of other courts with varying results, some rejecting it, see: Campbell v. OPM, 694 F.2d 305 (3d Cir. 1982); Chase v. OPM, 695 F.2d 790 (4th Cir. 1982); Morgan v. OPM, 675 F.2d 196 (8th Cir.

1982), some applying it, Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982); McCard v. MSPB, 702 F.2d 978 (11th Cir. 1983); Turner v. OPM, No. 82-1436 (D.C. Cir. May 17, 1983); Pitzak v. OPM, No. 82-1592 (10th Cir. July 14, 1983), and one accepting it with a limitation, Lancellotti v. OPM, 704 F.2d 91 (3d Cir. 1983). Our independent consideration has led us to what is in our view the sounder conclusion.

If the cases of our predecessor court referring to the "Scroggins formula" were interpreted as holding that § 8347(c) and (d) leave room for judicial review of voluntary disability retirement annuity claims, those cases to that extent would have to be viewed as wrongly decided and overruled.

The concern that apparently lead to the initial application of the "Scroggins formula" by our predecessor court, i.e., that administrators might unfairly force individuals from federal employment with an attached mental condition "stigma", has been fully met by Congress' enactment of § 8347(d)(2). The cases dealing with that form of retirement are therefore simply no longer viable.

Because all references to the "Scroggins formula" by our predecessor court appear in opinions of that court dealing with forced retirement, the Scroggins line of cases cannot serve as a basis for an assertion of jurisdiction to review an MSPB decision on voluntary retirement like that presented here.

(b) Review of Agency Action

Treatment of 5 U.S.C. § 8347(c) in the courts since 1956 seems to have been influenced by an apparent tendency to resolve doubt in favor of assuring federal court review of every conceivable objection to agency action. The tendency has on occasion served well the paramount public interest in the administration of justice, and has avoided a slamming of the federal courthouse door in the face of persons entitled to be there. Courts should be equally zealous in avoiding the unauthorized jamming of the courthouse door. Persons entitled to be there are harmed when denied or delayed entry by a crowd which is there not because a constitutional right is involved, or because a statute provides a right to be there, but only because a court had adopted an overly expansive view of its own jurisdiction.

In the present case, for example, it is nowhere asserted that Congress has ever specifically granted jurisdiction to any court to hear appeals from administrative decisions on claims for annuity by those who voluntarily retire. Whatever may be their "traditional powers", all federal courts are courts of limited jurisdiction. It is not within the powers, traditional or otherwise, of federal courts to fill every seeming jurisdictional void they may detect in congressional legislation; but if it were, there is no void detectable in § 8347(c) and (d).[2/]

2/ The powers of federal courts have been the subject of controversy since long before those courts were born. There

(continued)

The Administrative Procedure Act provides for judicial review of agency action, 5 U.S.C. § 704, but specifies that judicial review is not available when precluded by statute, 5 U.S.C. § 701(a). In Dismuke, 297 U.S. at 172, in Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967), and in Barlow v. Collins, 397 U.S. 159, 166-67 (1970) (quoting Abbott), the Supreme Court has erected a presumption of judicial review over agency action. It has, however, been careful in those cases to recognize the right of Congress, within constitutional boundaries, to rely on the administrative process and to preclude judicial review. As above indicated, we hold § 8347(c) an express preclusion of judicial review. Hence the presumption outlined in Abbott is inapplicable, and our holding here does not impinge upon or conflict with that presumption.

It is suggested that this court might reconcile the presumption of reviewability with the finality clause of § 8347(c) by noting the inclusion of OPM's fact finding role in

2/ (continued)

was deep distrust of a federal judicial system in the Constitutional Convention. See Farrand, The Records of the Federal Convention, (Rev. Ed. 1937); Prescott, Drafting the Federal Constitution, ch. 17 (1941). There was concern that the federal judiciary would find it had jurisdiction to achieve broad purposes of federal statutes. See 3 Elliott, Debates, 565. Early on, the Supreme Court held that inferior federal courts received no powers directly from the Constitution, but only such authority as may be vested in them by Congress, Turner v. Bank of North-America, 4 U.S. (4 Dall. 7) (1799); McIntire v. Wood, 11 U.S. (7 Cranch 503) (1813); Kendall v. United States, 37 U.S. (12 Pet. 524) (1838); Cary v. Curtis, 44 U.S. (3 How. 236) (1845), and that for jurisdiction to exist the Constitution must have given the capacity to take it and an act of Congress must have supplied it. The Mayor v. Cooper, 73 U.S. (6 Wall. 247) (1867).

that section, and by saying that Congress intended to preclude only a review of OPM's factual determinations. Then, we are asked to say, a claimant for a voluntary disability retirement annuity would retain a "right" to judicial review for a possible procedural or legal error by OPM or MSPB. We decline the suggestion. The question before us is not whether this or that type or breadth of judicial review would be in our lights advisable or appropriate. The question is whether any is authorized.

However attractive may have been the temptation to reconcile the reviewability presumption with § 8347(c) and (d) as they stood before the 1980 amendment, no such reconciliation is now possible. The current statute provides that OPM shall determine "questions" of disability and that its "decisions" concerning such matters are reviewable under § 8347(d)(1) only by MSPB. Thus Congress has provided, not precluded, review of OPM's factual determinations. It lodged that function, however, in MSPB. The statute further provides in § 8347(d)(2) for judicial review of particular MSPB decisions, under a particular standard of review found in § 7703. Congress having so divided and allocated the review function between the executive and judicial branches, the courts are not at liberty to reallocate it.

Moreover, the factual determination that a voluntary claimant is not disabled can be expected to control the outcome, as illustrated by the virtually universal denial of

relief, even in forced retirement cases, under the judicially crafted "Scroggins" type of review. Nor, the factual determinations being non-reviewable, is relief likely on legal or procedural grounds. As above indicated, one whose application for an annuity is denied after voluntary disability retirement is not by that denial alone deprived of a constitutional right. There being no liberty or fundamental pre-existing property interest at risk, the simplest procedures adopted by the agency will avoid a claim of denial of procedural due process.

It is, of course, possible to posit a scenario in which OPM and MSPB might both act so irresponsibly and arbitrarily as to employ unacceptable interpretations of law, statutes, or regulations, and totally inadequate procedures, for the purpose of denying annuities to those who voluntarily retire. Conjecture cannot alone, however, serve as a grant of jurisdiction. A facile formula based on a fear of faceless functionaries would be such a grant, for the court would have to exercise jurisdiction to determine whether legal or procedural error had occurred. Allegations of procedural error are easily made, as were the assertions here of failure to follow procedures inapplicable to Lindahl.

Whether the supposed scenario is realistic, and whether it be of a nature and breadth to warrant judicial review of all MSPB decisions on all voluntary retirement claims, would be a

matter for investigation and legislation (if deemed appropriate) by the Congress, not the courts.

(c) 5 U.S.C. § 7703 and 28 U.S.C. § 1295

Lindahl cites the broad provisions for review by this court of what he describes as "any" MSPB decision, and the grant of "exclusive" jurisdiction to this court over appeals from what he calls "all" MSPB decisions in 28 U.S.C. § 1295(a)(9). It is implied that a "conflict" or "anomaly" would somehow arise if, in the light of § 7703, it were held that §§ 8347(c) and (d) expressly preclude judicial review of voluntary disability retirement claims. We find no basis for that view.

First, retirement benefit claims are not adverse action claims. Fancher v. United States, supra, 588 F.2d at 807; Piccone v. United States, 407 F.2d 866, 872 (Ct. Cl. 1969). No voluntary disability claims have been reviewed under § 7703. Respecting involuntary claims, it was the Scroggins line of cases, not § 7703, which was looked to as a basis for jurisdiction.

Second, there is no "conflict" or "anomaly" created when Congress provides different routes and different forums for enforcement of different statutory rights. Indeed, Congress provided a divergent route in § 7703(b)(2) for a claim that an adverse action was based on discrimination. Thus an anomaly is avoided, not created, when the court honors the express exception to its § 7703 jurisdiction appearing in § 7703(b)(2)

and simultaneously honors the express exception to its § 7703 jurisdiction appearing in §§ 8347(c) and (d).

Third, there are numerous differences between an appeal from OPM's denial of a claim for annuity on voluntary retirement that may be brought to MSPB under §8347(d)(1), and appeals that may be brought to this court under § 7703. The former may be brought by "individuals"; involve "procedures prescribed" by MSPB; and place the burden on the applicant, Chavez v. OPM, 6 MSPB 343, 353 (1981). Those differences warrant, if warrant were needed, a difference in congressional treatment.

Fourth, a specific statute dealing with disability claims prevails over a general statute dealing with appeals generally from decisions of the MSPB. HCSC-Laundry v. U.S., 450 U.S. 1, 6 (1981).

Decisions of MSPB that can be challenged by a de novo trial in the district court (i.e., those resolving discrimination claims), and OPM decisions that Congress has specifically said are not reviewable except by MSPB (§§ 8347(c) and (d)(1)) are clearly not encompassed within the words "any" and "all" that were used by some congressmen in discussing the jurisdiction provisions in the FCIA. S. Rep. No. 95-969, 95th Cong., 2d Sess. 62, reprinted in 1978 U.S. Code Cong. & Ad. News 2784. It will not do to argue that references by some congressmen to review of "all" MSPB decisions by this court resulted in a repeal, sub-silentio, of §§ 7703(b)(2) and

8347(c). Repeal of a statute should never be assumed. Allen v. McCurry, 449 U.S. 90, 99 (1980).

Quite apart from the presence of §§ 7703(b)(2) and 8347(c) and (d), it is not true that Congress made "all" MSPB decisions appealable to this court. In 28 U.S.C. § 1295(a)(9), Congress provided this court with a jurisdiction over MSPB decisions different from that previously provided the Court of Claims and the regional Circuit Courts of Appeals. As discussed in Lancellotti v. OPM, supra, 704 F.2d at 97-99, those courts had been stated to have jurisdiction over "all final orders of the Merit Systems Protection Board" except those in § 7702(b)(2) cases. 28 U.S.C. § 2342(6) (Supp. IV 1980). In contrast, the FCIA makes the jurisdiction of this court applicable to appeals "pursuant to sections 7703(b)(1) and 7703(d) of title 5". Appeals of MSPB decisions under 5 U.S.C. § 1207 are directed to the regional circuits, not to this court. There is no appeal, even to the MSPB, under 5 U.S.C. § 3592.

As complicated and complex as the Civil Service Reform Act is, it is at least clear, when §§ 7703(b)(1) and 7703(d) are read in context, that among the final orders and decisions of the MSPB appealable to this court are those under § 7703(a)(1). Section 7703(a)(1), as applicable to this court, encompasses MSPB original jurisdiction cases and appeals properly brought to the MSPB under § 7701. Section 7701 itself encompasses agency decisions either specifically designated by the statute as appealable to MSPB under § 7701, e.g., 5 U.S.C.

§§ 3593(c)(2); 3595(c); 7543(d); and 8347(d)(2); or those so designated by "rule or regulation".

The provision governing MSPB's jurisdiction, 5 U.S.C. § 7701, raises no conflict with our adherence to the statutory preclusion of judicial review present in §§ 8347(c) and (d). In connection with appeals to MSPB like Lindahl's, MSPB has by regulation elected to employ § 7701 procedures. See 5 CFR § 1201.3(a)(6). The question of whether MSPB correctly employs § 7701 procedures in exercising its review authority of particular agency decisions under § 8347(d)(1), however, is not before us. An MSPB election to treat its review authority under § 8347(d)(1) as permitting use of § 7701 procedures cannot constitute a grant of jurisdiction to this court to review all decisions MSPB reaches under § 8347(d)(1). Schwartz v. Department of Transportation, No. 83-768 (Fed. Cir. Aug. 23, 1983). Nor can that election work a repeal of § 8347(c). Nor is there reason to suppose that MSPB authority to render decisions and this court's jurisdiction to review MSPB decisions must be identical or coextensive.

To hold that judicial review of all § 8347(d)(1) decisions had all along been available under § 7703, would be to render superfluous Congress' action in § 8347(d)(2), making judicial review available for particular claims under § 7703.

We need not, and hence do not, decide in this case whether all decisions of MSPB under § 8347(d)(1) are denied

judicial review by § 8347(c). If § 8347(c) is to have any meaning, there must be some decisions of OPM that are final and conclusive and not reviewable except by MSPB under § 8347(d)(1). It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this court.

(d) The 1980 Amendment

It is suggested that Congress knew of Scroggins at the time of the 1980 amendment, and that it effectively ratified judicial review under the limited "Scroggins formula", because it did not specifically say it was not doing so. We are cited to statements of congressmen mentioning Scroggins, H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. 3 (1980), and to contrary statements of other congressmen who thought that all judicial review was precluded by § 8347(c). S. Rep. No. 96-1004, 96th Cong., 2d Sess. 2, reprinted in 1980 U.S. Code Cong. & Ad. News 5986, 5987; H.R. Rep. No. 96-1080, supra, at 4. Though OPM's director could not express the intent of Congress, we are cited to a letter from him in which he acknowledged existence of the review referred to in Scroggins. H.R. Rep. No. 96-1080, supra, at 8-10. The legislative history contains no statement of the "formula", no recognition that the "formula" had been mentioned in forced retirement cases, and no express acknowledgement that the "formula" had resulted in virtually no reversals of the decisions reached in the administrative process.

We find no support for the view that the 1980 amendment merely expanded the "breadth" of review, in cases of forced retirement on mental condition, beyond the "limited" review said to be available for such cases in Scroggins. If that were true, it would, as above indicated, merely remove the viability of Scroggins. It would not establish that a judicially created and judically limited review had existed for other types of cases, such as the voluntary retirement type presented here. What did not properly exist cannot be expanded.

It is one thing to say on a particular record that Congress had incorporated the judicial "gloss" placed on a statute. It is another to say that a court's departure from an express preclusion of review is adopted unless Congress in reenacting the preclusion verbatim specifically adds "we meant what we said the first time". Whether a court may require Congress to specifically disallow review the court had "allowed" is not here a relevant consideration. In § 8347(d)(2) Congress not only allowed but legitimized judicial review in the type of case in which our predecessor court had said it was appropriate, while simultaneously reenacting the express review preclusion in § 8347(c) and making plain that §§ 8347(d)(1) and (d)(2) were exceptions to that preclusion.

That some congressmen and the director of OPM referred to the existence of a court-designed review formula, or that some congressmen said the law was not being changed, or that some criticized Scroggins, or that some said § 8347(c) barred

all judicial review, cannot be controlling. We look not to conflicting comments of a few congressmen, but to what Congress did. What it did in 1980, as above indicated, was to add an exception to its prohibition of review in disability cases, and allowed judicial review when the government orders retirement for mental disability. What it did was to leave § 8347(c) and its finality clause untouched. The "law" that Congress did not change in 1980 was the law Congress enacted in § 8347(c) and never repealed.

CONCLUSION

A Congress frequently criticized for vastly increasing the jurisdiction of the federal courts, with insufficient concern for the impact of its legislation on those institutions, has enacted an employee retirement scheme which relies on the administrative process, and in 5 U.S.C. § 8347(c) and (d)(1) excludes the courts from review of administrative decisions in at least those cases involving voluntary claims for disability annuities. That effective congressional solicitude for crowded court dockets, and for the effect of that crowding on deserving litigants, deprives no one of any constitutional or statutory right.

The statute, 5 U.S.C. § 8347(c) and (d), is clear and unambiguous. Whether the finality clause of § 8347(c) should have been from the outset honored by judicial recognition that

jurisdiction was lacking is academic. Today this court applies to the case before it the statute as written.

ORDER

It is ordered that respondent's motion to dismiss for lack of jurisdiction be and it is hereby granted.

DISMISSED

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL, Petitioner,	)	
v.	)	Appeal No. 39-81
OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	

NICHOLS, Circuit Judge, concurring.

I agree with the judgment and join in it. Chief Judge Markey's able opinion I join in except where it is inconsistent with what follows.

First, I believe it is ill-advised to limit our holding to applicants for disability annuity who have themselves voluntarily retired from active employment because of disability. (a) The statutory preclusion of judicial review, relied on by the court, 5 U.S.C. § 8347(c), itself draws no such distinction, except in the category, not here involved, of involuntary retirement for mental disability. For this court to draw one belies our own conclusion that preclusion statutes mean what they say. (b) The distinction we draw will have unfortunate consequences in that persons of marginal disability will hang in and insist on involuntary retirement so as to safeguard their annuity rights, to the detriment of the federal service, and (c) the factual basis of the statement that Mr. Lindahl is a voluntary retiree is uncertain. It is clear he

did not want to be retired except on the condition that he receive the annuity. That is why we have this lawsuit. If he put in an application for retirement that failed to make clear the precondition he had in mind, that may be dispositive of the present case, but only because nobody focused on the voluntary nature of the retirement, as an issue, and nobody took the trouble to clarify the record. Who said what to whom on what date is quite obscure. Nor is it clear whether Mr. Lindahl was adequately warned that by applying as he did, he sacrificed his active duty pay without obtaining assurance as to disability annuity. I would prefer to assume in favor of Mr. Lindahl that the retirement was involuntary except insofar as he agreed with management that he was in fact disabled, and differentiate the case to that extent only from those in which the much discussed "Scroggins formula" was invented and applied.

The chickens will come home to roost in a whole series of cases in which it will be alleged that the "Scroggins formula" survives and has an area for application, despite the Lindahl decision, because the disability retirement was de jure involuntary, or actually involuntary in view of the course of discussion of the applicant's physical problems, between him and management.

Second, having noticed and acknowledged that decisions of other circuits are in conflict as to whether the

"Scroggins formula" undercuts the finality or preclusion language of § 8347(c), the court moves along without stating why the decisions applying the preclusion are prefrred over those applying the formula. Though we are now to be, under the Supreme Court, the paramount authority to decide the issue under the Federal Courts Improvement Act of 1982, and none of these decisions bind us, they were rendered by courts having jurisdiction at the time, courts of last recourse as of right. None of the decisions, probably were products of such agonizing introspection as ours will be. None were rendered in banc. It is usual, however, for courts, federal and other, raised under our common law traditions, to regard decisions by other courts of equal authority as part of the problem to be dealt with, to be followed or explained away. I do not think the fact they are in conflict with each other is the only thing about them one need notice. There is a somewhat wooden quality about most of them. Those adhering to the formula adhere also to the often expressed judicial horror of leaving any executive branch decision immune to judicial review, without notice of the fact that this horror is much mitigated when it is a question of a money claim against the United States, as an annuity claim is, even apart from statutory preclusions. United States v. Testan, 424 U.S. 392 (1976). Those adhering to the preclusion likewise fail to notice how far the horror has often

carried other courts, despite other express and implied statutory preclusions. The proper technique of weighing this horror against a statutory preclusion is a subject nobody seems willing to discuss, and perhaps wisely. I come out with the unsurprising conclusion that the decisions I agree with as to result are better considered, and I have at least one articulable reason for this which I will state infra.

A third and more serious objection I have to our generally able decision, is that it too ignores the striking contrast the "Scroggins formula" presents to the techniques of our highest court, and other courts, in dealing with "finality language" in other statutory contexts, and alleged to bar or curtail the judicial review that would otherwise occur.

The World War II Renegotiation Acts, 50 U.S.C. app. § 1191 and ff, both contained, originally or as amended, provisions (subsection (e) of § 1191) that a party aggrieved by an order to eliminate excessive profits could file a petition with the Tax Court:

> Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency.

In Lichter v. United States, 334 U.S. 742 (1947), the Supreme Court, though viewing the Tax Court as an adminis-

trative agency, upheld the constitutionality of these arrangements as a war measure under the constitutional war power. In United States v. California Eastern Line, Inc., 348 U.S. 351 (1955), the Court gave the finality language a literal interpretation, holding it did not extend to questions as to what contracts were renegotiable, even though this necessarily underlay the issue of "amount."

The Renegotiation Act of March 23, 1951, 50 U.S.C. app. § 1211 and ff, set up a scheme that was similar so far as concerned the role of the Tax Court, and in § 1218 had a similar finality clause. That Act was extended several times regardless of whether the Lichter grounds existed, i.e., a state of all-out or total war. The circuits that considered the question refused to hold that any exception existed to the finality language, except review on "constitutional or jurisdictional grounds." Consolidated-Hammer Dry Plate & Film Co. v. Renegotiation Board, 375 F.2d 591 (7th Cir. 1967); Boeing Company v. Renegotiation Board, 325 F.2d 885 (9th Cir.), cert. denied, 377 U.S. 923 (1963). The rule then was that "amount" determinations, whether they related to fact or law, were reviewable only on "constitutional or jurisdictional" grounds. Whatever that was held not an "amount" determination was reviewable the same as any Tax Court decision by a court of appeals, when it concerned a federal tax.

The Seventh Circuit, in its case, considered whether some "amount" holdings were "so arbitrary and capricious as to raise a constitutional issue" and stated they were not, but also said that its review of them was gratuitous. (375 F.2d at 594.)

All this is ancient history as the last extension of the Renegotiation Act has long since expired, but it does throw some light on the technique of applying finality clauses.

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876, provides that court-martial sentences, after proper review by military tribunals are "final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all * * * courts * * * of the United States * * *." In Schlesinger v. Councilman, 420 U.S. 738 (1975), it is held that this did not necessarily bar an Article III court from intervening by way of habeas corpus, injunction, or back pay suit in case of an unconstitutional or otherwise void court-martial. United States v. Augenblick, 393 U.S. 348 (1969) previously had reversed two decisions of the former Court of Claims that had sustained collateral attacks on court-martials by way of back pay suits, but paid insufficient respect to the finality language. It seems fair to say the distinguished record of the Court of Claims may have displayed such in-

sufficient respect, not alone in enunciating the "Scroggins formula."

United States v. Wunderlich, 342 U.S. 98 (1951) reports an earlier losing encounter by the former Court of Claims with finality language. In that case the issue was the respect to be given to language then standard in government contracts, making decisions of contracting officers final in all cases of disputes with contractors, whether on issues of fact or of law. The Court of Claims by long and generally accepted practice had read into this language an implied exception for decisions "so grossly erroneous as to imply bad faith," e.g., Levering & Garrigues Co. v. United States, 71 Ct. Cl. 739 (1931). The Supreme Court, in a decision that caused many tremors, held that the only permissible exception was actual fraud. Congress, by statute, reinstated the previous rule. 41 U.S.C. § 321, 322. See history of this issue in Hoel-Steffen Construction Co. v. United States, 684 F.2d 843 (Ct. Cl. 1982) in which it is pointed out that there is necessarily a great difference between contract and statutory finality of decision, the former not affecting the waiver of sovereign immunity and consent to be sued as the latter often does.

Allowance of disability annuities to war veterans is a case decidedly parallel to the civilian annuities we have to deal with here.

The finality language in 38 U.S.C. § 211 bars judicial review of Veteran Administration decisions concerning veterans' benefits. It is not the same as § 8347(c) inasmuch as it is not limited to issues of disability and dependency and court review is expressly referred to. For whatever the point is worth, it may be noted that the Court of Claims never even in dictum pronounced any "Scroggins formula" type of exception to finality and the complete exclusion of the court from the area is rather assumed than asserted. Cases are, e.g., Martin v. United States, 197 Ct. Cl. 1062 (1972); Jennings v. United States, 214 Ct. Cl. 789 (1977); Jump v. United States, 164 Ct.Cl. 453 (1964). In Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), aff'd, 51 U.S.L.W. 4999 (June 27, 1983), the Court of Claims appears to recognize in dictum at 268 that this finality language provides "against any judicial scrutiny at all."

The Supreme Court in Johnson v. Robinson, 415 U.S. 361 (1974), held that § 211 did not bar judicial consideration as to the constitutional validity of provisions of the laws providing veterans' benefits, a conclusion based on the bare language of § 211 as well as its purposes as shown by legislative history. The decision is not therefore a matter of reading unstated exceptions into the finality language itself. Justice Brennan's care in framing the majority opinion so as not to do this is noteworthy.

The Supreme Court handed down in United States v. Erika, Inc., 456 U.S. 201 (1982) a decision which has a powerful impact upon the matter at hand. It deals with Medicare reimbursement to health care providers. These are in two kinds, Medicare A and B. Medicare A is primarily for hospital care and hospitals are paid by the government through an intermediary. Medicare B is optional for beneficiaries, is primarily for doctors' fees and other nonhospital health care expenses. Annuitants who elect the coverage pay a small amount which entitles them to be reimbursed by the government for payments which they make direct to the providers, or they may assign their claims to providers who collect from the government as assignees. Judicial review in the district courts only under Medicare A is expressly allowed, in cases of dispute as to the compensation allowable to providers. Distinctions are made as to the extent of administrative review as to issues of eligibility, and quantum under B. Congress is shown by the legislative history to have omitted Medicare B claims from judicial review because it expected most of them to be too small to take the time of the courts, overlooking that a concern such as Erika might be assignee of hundreds of claims and thus have large sums at stake. If Congress had said nothing about review, Erika and all other providers could have sued in the Court of

Claims under the Tucker Act, 28 U.S.C. § 1491. The Supreme Court held, however, that the fashioning of judicial remedies for the A cases with nonjudicial review in the B cases, implies an intent that this is to be all. Such an implication is drawn from the bare text even before it is confirmed by the legislative history, showing the reason for the difference as stated above.

Thus there can be implied preclusions of judicial review where the finality of the administrative decision is made just as absolute as when the preclusion is express. The reversed decision below, Erika, Inc. v. United States, 634 F.2d 580, 587 (Ct. Cl. 1980), undertook to use the "Scroggins formula," urging in support of its position that the "formula" cases, several of which it cited, showed that even an express preclusion allowed its exceptions though unrecognized in the statute itself; still more then would this be true of a merely implied preclusion. In Erika the Supreme Court teaches that express and implied preclusions are equally effective.

Congress has stated the same view. 5 U.S.C. § 702, Pub. L. No. 94-574, Act of October 21, 1976, is a broad waiver of sovereign immunity and consent to be sued in the federal courts in cases "seeking relief other than money damages." It provides that it does not "affect other limitations on judicial review" or confer "authority to grant

relief if any other statute that grants consent to suit expressly or impliedly forbids the relief that is sought." The legislative history, H. Rep. No. 94-1656, 5 U.S. Code Cong. & Adm. News, 94th Cong. 2d Sess. 1976, shows that Congress considers a statute impliedly precludes judicial review if it contains any "implied preclusions" and description of one method of review impliedly precludes other methods. By this reasoning, the provision in § 8347(d) for judicial review of involuntary disability retirements for mental condition would preclude judicial review of other disability retirement decisions even without the finality language in § 8347(c). Congress has put two locks on the door.

The circuit court decision adopting the "Scroggins formula" in their decisions, relied on by the dissent herewith, in my view reveal how ill considered they are by their failure to deal with Erika. The OPM rightly relies on Erika as the strongest kind of Supreme Court support for its motion, citing it five times in its initial brief. Yet our majority opinion ignores Erika for reasons unfathomable by me.

In Erika we have the same court that first employed the "Scroggins formula" to undercut statutory finality, or express preclusion of judicial review, then for the first time after many years, proposing to extend the formula to

another statutory preclusion, this time an implied one. At least I suppose that was the intent, though this was not expressly stated. The Supreme Court shoots this aircraft down in flames. If the formula still stands in the area of disability retirement, it stands as an odd anomaly which may not be, and never has been, extended to parallel situations. The law normally dislikes oddities of that kind, but seeks to regularize and harmonize. One is reminded of the rule once enforced by Chief Justice Rugg upon the Massachusetts Supreme Judicial Court that it was never to overrule a decision of its own that on later reflection it perceived to be erroneous. It was only to restrict the disfavored precedent "to its own peculiar facts," a signal to the bar never to cite the case again.

The technique of applying a statutory preclusion of judicial review is not, however, the simple open-and-shut or black-and-white issue it is perceived to be in the able majority opinion. As stated by Justice Brandeis years ago, Lynch v. United States, 292 U.S. 571, 586 (1934), a statute denying a constitutional right will not be read as a preclusion to save its constitutionality, but will only be so read if the language of Congress is unequivocal and no other interpretation is possible. This will rarely occur. The apparently flat and sweeping preclusion of § 876 of the Uniform Code of Military Justice is read in

Schlesinger v. Councilman, supra, as allowing all sorts of collateral attacks in civilian courts if an alleged constitutional violation is grave enough or if the court-martial decision is simply void. (As to what is or was a void court-martial see II Court of Claims History (1978) at 49.) This result is much aided by the legislative history showing that the language was never expected to be a barrier to habeas corpus in appropriate cases. In Johnson v. Robinson, supra, recourse is had to legislative history material to show that, despite sweeping language, preclusion of inquiry by a court as to the constitutionality of a statutory provision affecting veterans' rights was not intended.

United States v. California Eastern Line, Inc., supra, shows a technique of literal construction of a statutory preclusion to save judicial review. Thus a preclusion of review as to "amount" of excessive profits determined in renegotiation is held not to preclude review as to what contracts are renegotiable, though the answer will govern "amount." In Polos v. United States, 621 F.2d 385, 391-92 (Ct. Cl. 1980), the suggestion is made or implied that the decisions as to disability and dependency, given finality by § 8347(c), are decisions as to questions of fact, whereas the questions saved for judicial review by the "Scroggins formula" are questions of law. The idea is

spelled out more expressly in Lancellotti v. OPM, 704 F.2d 91 (3d Cir. 1983). That case identifies a situation where "disability" vel non depends on the answer to a legal question: construction of a statutory provision for termination of status as a disability annuitant upon one's reaching a specified level of income from wages or self-employment.

This kind of reasoning certainly echoes that found in the Supreme Court precedents in their technique of construing statutory finality clauses. However, I do not think it is valid here because it deals with only one of what I have called double locks: the express preclusion but not the implied one. The interpretation of the decisions given finality in § 8347(c) as those establishing facts only is possible but not required by the language of § 8347(c) standing alone, and is contradicted by the implied preclusion in § 8347(d), with the cross-reference from (c) to (d) added in 1980.

Mr Lindahl's principal complaint of the MSPB decision is that it misallocated the burden of proof which he says should have been placed on the OPM, not on him. He next says it was a violation of "due process" to discharge him while his application to the OPM for disability retirement was pending undecided. This appears to be actually a complaint of failure to follow a governing regulation.

Thirdly, he says the decision of the MSPB that he was not disabled is unsupported by substantial evidence. The first two issues would arguably be saved from dismissal by the "Scroggins formula" which he invokes, but not if it is repudiated as a rule of decision in this court, as I favor. The third issue is not possibly saved for him even by the "Scroggins formula" since that formula does not provide for substantial evidence review. The dissent therefore should concede dismissal of that issue, to be consistent with the formula.

In summary, my conclusion is that preclusion of judicial review is never absolute in life, but at the Supreme Court level review has never been practiced in defiance of preclusions as much as the "Scroggins formula" would require. The formula is at best a peculiar anomaly invoked in but one class of case. Virtually it is an invitation to counsel to litigate any issue of statutory construction or interpretation of a regulation. As the Chief Judge writes, it was born of a judicial reluctance to be wholly bound from review of involuntary disability retirement cases where a desk official was given unregulated and unrestricted power to brand a resisting civil servant as mentally disabled. This situation is fully taken care of in § 8347(d)(2) and all other disability retirement rulings under § 8347(c) are at any rate subject to independent due process review by a quasi-judicial body that

seems as well suited to perform the task, as the Tax Court was for renegotiations. Now the "Scroggins formula" remains to clutter and confuse the law in cases for which it was not devised, one that invites litigation in an area where Congress wished it not to be. We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective.

I would grant the motion as to all issues briefed for review by Mr. Lindahl.

WAYNE LINDAHL,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

Appeal No. 39-81.

NIES, Circuit Judge, concurring.

I join in the opinion of the majority but I do so, in part, because of the issues raised by Lindahl's petition for review which are not discussed in the other opinions. Lindahl seeks judicial review essentially of two issues: (1) the fact of his disability and (2) the failure of the MSPB to impose the burden of proof on OPM as required by 5 U.S.C. § 7701(c). The "question of disability" is clearly precluded by 5 U.S.C. § 8347(c) from judicial review. I do not agree, if the majority so holds, that all aspects of a disability claim are precluded from judicial review, although the claimant would have to seek relief through a different forum since our appellate review is limited to involuntary mental disability cases.

The second argument merely illustrates the error of the MSPB in attempting to force all disability claims into § 7701. MSPB admittedly does not follow § 7701 in a case such as this one. However, a statutorily imposed burden of proof cannot be conveniently ignored.

Since the thrust of appellant's petition is to obtain judicial review of the fact of his disability, I would not transfer the case to the United States Claims Court, as appellant asks. Judicial review of that question is precluded.

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Appeal No. 39-81

DAVIS, Circuit Judge, with whom FRIEDMAN, KASHIWA AND SMITH, Circuit Judges, join, dissenting.

In my view the 1980 amendment of 5 U.S.C. § 8347 did not lessen or abolish the very narrow judicial review that has been accorded to disability retirement matters at least since 1956.[1/] The legislative objective, rather, was to expand judicial review in the special area of involuntary mental-disability-retirement. I join, therefore, with the several courts of appeals that have come to the same conclusion. Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982); McCard v. United States, 702 F.2d 978 (11th Cir. 1983); Turner v. OPM, (D.C. Cir., May 17, 1983); Pitzak v. Office of Personnel Management, No.

1/ See Elmore v. Bruckner, 236 F.2d 734, 736-37 (D.C. Cir.), cert. denied, 352 U.S. 555 (1956); Murphy v. Wilson, 236 F.2d 737 (D.C. Cir. 1956); Smith v. Dulles, 236 F.2d 739, 740, 742 (D.C. Cir.), cert. denied, 352 U.S. 955 (1956); Gaines v. United States, 158 Ct. Cl. 497, 502, cert. denied, 371 U.S. 936 (1962); Scroggins v. United States, 397 F.2d 295, 297 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968); McGlasson v. United States, 397 F.2d 303, 307 (Ct. Cl. 1968); McFarland v. United States, 517 F.2d 938, 942-3 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); Allen v. United States, 571 F.2d 1411 (Ct. Cl. 1978); Pancher v. United States, 588 F.2d 803, 806 (Ct. Cl. 1978); Polos v. United States, 621 F.2d 385, 391-2 (Ct. Cl. 1980).

82-1592, (10th Cir., July 14, 1983); see also Lancellotti v. OPM, 704 F.2d 91 (3rd Cir. 1983).[2/] Because of these recent opinions, which cover the ground, I shorten my statement.

The core of it is that (a) the standard of narrow judicial review had been utilized for many years when Congress considered the 1980 amendment;[3/] (b) Congress was made quite aware of that standard during its consideration of the 1980 amendment; (c) the whole focus of that Congressional consideration was the over-narrowness of that standard for involuntary mental disability cases; (d) no one seems to have suggested that, for other types of disability cases, the existing standard should be lessened or all review abolished (indeed, the then Director of OPM expressly told Congress that the prior standard would continue for non-mental disability cases, see Turner v. OPM, supra, slip op. at 9-10); (e) there is nothing in the Committee reports or the floor discussion suggesting that the prior judicial standard was no longer to be followed in the non-mental area; and (f) no change was made in the wording of the "finality" clause (except for the special provision for mental disability and express authorization for review by the MSPB).

2/ In Campbell v. OPM, 694 F.2d 302 (1983), the Third Circuit seemed to view the 1980 amendment as abolishing all judicial review in non-mental disability retirement cases, but the later ruling in Lancellotti appears to have qualified Campbell by according judicial review to legal rulings bearing on disability retirement pay. 704 F.2d at 96-98.

3/ This standard is often called "Scroggins-type" review but it actually goes back about a dozen years before Scroggins was decided. See supra note 1.

In the face of that history, it is hard for me to think that, in explicitly expanding review for mental cases, Congress silently withdrew for non-mental cases the limited judicial review that had long been allowed. To paraphrase what the Supreme Court said in Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381-2 (1982) (a recent Supreme Court decision holding that the reenactment and enlargement of another federal statute had incorporated a prior judicial gloss): "it is abundantly clear" that the Scroggins standard "was a part of the 'contemporary legal context' in which Congress legislated" in 1980. "In that context, the fact that a comprehensive reexamination and significant amendment" of the disability retirement legislation "left intact the statutory provisions under which the federal courts" had developed and used the Scroggins standard "is of itself evidence that Congress affirmatively intended to preserve that remedy." When the "finality" language was retained and embodied in the 1980 amendment, that language carried with it the existing judicial interpretation.

By the same token it is improper to decide now (as the majority intimates should be done) that the Scroggins reading was incorrect when first adopted in 1956 (and since followed) and should be jettisoned regardless of Congress' position in 1980. Because Congress "affirmatively intended [in 1980] to preserve" that standard we cannot and should not now rule to the contrary.

For these reasons,[4/] the motion to dismiss should be denied and petitioner accorded the right to have his claim tested under the so-called Scroggins standard.

4/ These reasons apply a fortiori to the amendment made by the Civil Service Reform Act of 1978, as to which there is not the slightest indication of any purpose to change the then-existing standard of review.

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL, Petitioner,	)	
v.	)	Appeal No. 39-81
OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	

SMITH, Circuit Judge, with whom FRIEDMAN, DAVIS, and KASHIWA, Circuit Judges, join, dissenting.

I fully join Judge Davis' dissent, but I write separately because I believe it particularly important, at the threshold of this court's existence, to consider the overall statutory structure of the civil service provisions as they relate to this court's appellate jurisdiction. I am especially mindful that, under the Federal Courts Improvement Act of 1982, this court is now the only circuit-level forum for petitioners seeking judicial review of most agency actions under the civil service laws. With the majority's result, I fear, we have adopted an unnecessarily cautious and restrictive approach to our nation-wide jurisdiction in this area.

I.

The comprehensive appellate framework established over the considerable period of time between enactment of the

Civil Service Reform Act of 1978 and the Federal Courts Improvement Act of 1982 -- and constructed by more than one Congress -- does not present a model of clarity or singularity of purpose. Specifically, the statutory interrelationships are significantly preordained depending upon the section of the code through which one enters in search of the various paths of appeal through this maze. The majority has entered the maze through a portal which mandates a dead end; it errs by failing properly to consider and weigh the merits of the other paths.

A.

Beginning at section 7703(a)(1),[1/] which is the jurisdictional provision for the Federal Circuit in the Civil Service Reform Act, this court has exclusive jurisdiction (see 28 U.S.C. § 1295(a)(9)) over "a final order or decision of the Merit Systems Protection Board" (emphasis supplied). An express exception to this inclusive jurisdiction is for discrimination cases, in section 7703(b)(2). Possible or partial exceptions may also be found in the civil service provisions dealing with review of Special Counsel cases[2/] and Senior Executive Service remov-

---

1/ All section references are to title 5, U.S.C., except where otherwise indicated.

2/ Sections 1206 and 1207 concern Special Counsel investigations or prohibited personnel practices and hearings

ases.[3] Furthermore, section 7703(d) provides that the director of the Office of Personnel Management (OPM) may petition for review of "any final order or decision of the Board" (emphasis supplied) and that the Federal Circuit may hear any such case.[4]

2/ (Cont'd)

and decisions thereon. Section 1206(c) gives the Special Counsel authority to request the MSPB to take action on a prohibited personnel action; § 1206(g) requires the Special Counsel, if it determines that disciplinary action should be taken against an employee, to proceed according to § 1207; § 1206(h) authorizes the Special Counsel to seek corrective action before the MSPB for a pattern of prohibited personnel practices not otherwise appealable to the MSPB under § 7701; and § 1207(c) provides an employee subject to disciplinary action under § 1206(g) with the right to obtain judicial review of a final order of the MSPB in the appropriate regional circuit. I do not attempt to sort out here to which circuit court (this court or regional circuits) appeals for various types of Special Counsel cases go. Suffice it to say, however, that the matter is more complex than the majority, citing § 1207 only, has suggested.

3/ Section 3592, concerning removal from the Senior Executive Service, allows a career appointee to request, in certain circumstances, an informal hearing before an official appointed by the MSPB, but denies that appointee the right to initiate an action with the MSPB under § 7701. The majority summarily concludes from this provision that the career appointee has neither MSPB nor court appeal rights in these circumstances. While this may be correct (i.e., there may not be "a final order" of the MSPB), I am not prepared to so quickly hold without proper examination of congressional intent and the structure of this provision. (For example, §§ 3593 and 3595 authorize career appointees to appeal certain Senior Executive Service reinstatement or reduction-in-force actions under § 7701 to the MSPB.)

4/ It seems clear that "a" in § 7703(a)(1) means "any," and so would achieve parallelism with subsection (d)(1). Such interpretation, however, is not necessary to my views.

Section 7703(a)(2) also has implications for the jurisdiction of the MSPB and this court. It differentiates between the procedures to be followed in review of final orders or decisions "issued by the Board under section 7701" and those to be followed in review of other MSPB decisions. See Phillips v. USPS, 695 F.2d 1389, 1390 n.2 (Fed. Cir. 1982). Thus the MSPB has not one but a plurality of jurisdictional bases for its actions, and it is important to see what each is.

Section 7701(a) is clearly the main basis -- it covers in essence all appealable agency adverse actions -- and we have held that our jurisdiction of section 7701(a) actions is "plenary." Rosano v. Department of the Navy, 699 F.2d 1315, 1317 (Fed. Cir. 1983). Section 7701(a) is expressly made the jurisdictional basis for actions under sections 4303(e) (actions based on unacceptable performance), 7513(d) (adverse actions taken to promote the efficiency of the service), 7121(e) (grievance procedures), 7543(d) (actions against senior executives), and 3593 and 3595 (reinstatement or reduction in force in the Senior Executive Service). Section 5335(c) (withholding of periodic step increase), though it mentions no jurisdictional basis, has been held to be appealable under section 7701. Meyer v. Department of Health & Human Services, 666 F.2d 540, 544-45 (Ct. Cl. 1981). Likewise, many actions made appealable to the MSPB by OPM regulation (see section 7701(a), 5 C.F.R.

§ 1201.3(a)(8)) would be appealed under section 7701, though the regulations do not specifically mention it. See, e.g., 5 C.F.R. § 351.901 (reduction in force); 5 C.F.R. § 300.104(a) (employment practices). Finally, section 8347(d)(2) (OPM mental disability) determinations are expressly reviewed under section 7701(a).

Non-7701(a) cases would include, first, section 7702 (discrimination) cases which do not come to the Federal Circuit at all. Secondly, section 8347(d)(1) (OPM physical disability) determinations are also heard by the MSPB, but are either reviewed, as I see it, under Scroggins standards, i.e., a lower standard than for section 7701, or, as the majority sees it, not at all, i.e., a much lower standard than 7701. Thirdly, those non-7701(a) cases referred to in section 7703(a)(2), then, must include actions pursuant to sections 1206(c) and (h) (special counsel actions) and possibly 3592 (removal from the Senior Executive Service).[2/] Finally, MSPB decisions regarding award of attorney's fees under section 7701(g)(1) do not originate in an agency but are nevertheless reviewable by this court. See, e.g., Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983).

To sum up, if one starts with section 7703(a)(1), one finds that this court has jurisdiction of all MSPB deci-

---

2/ See notes 2 and 3, supra.

sions except discrimination cases and possibly certain Special Counsel and Senior Executive Service cases. MSPB decisions fall into five categories -- section 7701(a), non-7701(a) (i.e., those indicated by section 7703(a)(2)), physical disability determinations, attorney's fees awards, and discrimination -- each of which categories has a different (or no) standard of review in this court.

B.

Starting instead at section 7701(a), the provision for MSPB jurisdiction, one immediately notes that its language is as broad as (or broader than) the provision for Federal Circuit jurisdiction in section 7703(a)(1). The MSPB has jurisdiction of "any action which is appealable to the Board under any law, rule, or regulation" (emphasis supplied). Based on this plain language, the MSPB has taken the position that 7701 is an umbrella provision, encompassing all substantive rights to appeal. In other words, all non-discrimination claims are funneled through section 7701 review by the board and thence to the Federal Circuit.

It is tempting to accept this view, for, since we have held that our section 7701(a) review authority is "plenary" (Rosano), this view would obviate the need for these many pages attempting to unravel the jurisdictional knot before us. I agree with the majority, however, that careful statutory construction cannot bring us to such an elegant con-

clusion. For example, if all review were either under section 7701 or 7702, then section 7703(a)(2) would be meaningless in suggesting non-7701 appeals to the Federal Circuit. Sections 1206, 1207, 3592, and 8347(d)(1), which expressly or apparently provide independent appeal routes to the MSPB, would be overridden.

C.

As to another alternate route, if one begins at section 8347, as the majority does, it seems immediately apparent that section 7701 does not apply to section 8347(d)(1) (physical disability) actions. Legislative history aside, the structure of subsections (c) and (d) makes it plain that a difference in treatment is intended between paragraphs (1) and (2): that MSPB reviews mental disability ((d)(2)) under 7701, while it reviews physical disability ((d)(1)) under (d)(1) itself, with procedures prescribed by the MSPB. There is therefore a conflict here with the plain language of section 7701(a), which covers "any action * * * appealable to the Board under any law." (Emphasis added.)

Moreover, as the majority discusses, the statute provides that mental disability ((d)(2)) cases are not only to be reviewed by the MSPB under section 7701 but also "shall be subject to judicial review under section 7703." Since this language is absent from the physical disability

(d)(1) provision, the majority not unreasonably concludes that Congress meant to deny section 7703 judicial review to (d)(1) physical disability cases. The majority finds conclusive statutory support for this view in the section 8347(c) "finality clause."6/

Viewed in isolation, then, section 8347 would suggest an appellate structure different from that suggested either by the MSPB or Federal Circuit provisions. Yet, even if one did not question the wisdom of determining overall appellate structure from a small part of the whole rather than from one of the broader appellate provisions, the conflict remains.

II.

As the foregoing demonstrates, under the civil service laws the appellate structure can be a relative thing. By concentrating on section 8347, the majority has not eliminated or avoided anomaly but has fallen victim to this relativism and implicitly created an anomalous system which, even if it is the best one (which I do not believe), fails to account for the difficulties it engenders.

The most significant anomaly, to my mind, is the con-

6/ So persuasive is the so-called "finality clause" in the majority's view, however, that it proceeds to the next and, to my mind, wholly unnecessary step of abolishing even the long-standing Scroggins review. I respectfully part company with the majority at this point.

flict between the majority's holding of no review and the plenary authority of the Federal Circuit to review as set out in section 7703(a)(1). Section 7703 contains broad and inclusive language. The Senate Report on the Civil Service Reform Act states that this section "applies to judicial review of all final orders or decisions of the Board * * *." S. REP. NO. 969, 95th Cong., 2d Sess. 62, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2723, 2784 (emphasis supplied). Under the Federal Courts Improvement Act, the entire jurisdiction created by section 7703 devolved upon this court. H.R. REP. NO. 312 at 18 ("jurisdiction * * * over all appeals from the Merit Systems Protection Board" (emphasis supplied)); S. REP. NO. 295, 97th Cong., 2d Sess. 21, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 11, 31 ("jurisdiction of any appeal from a final order or final decision of the Merit Systems Protection Board" (emphasis supplied)). There is absolutely no reason to believe -- and numerous reasons to doubt -- that Congress intended this court to approach its MSPB jurisdiction with the extreme caution practiced by the majority.

A more particular anomaly is created by the majority with respect to section 7703(d) -- OPM petition for review of any MSPB decision. I have already noted that the majority too easily implies a total lack of judicial review for voluntary retirees in physical disability cases, notwithstanding the fact that in almost a quarter century of

experience under the Scroggins formula there has been no jamming of the courthouse door by the few fingers that have grasped it. Amazingly enough, the majority also chooses this opportunity to preclude judicial review in these cases for OPM as well. This despite the express language of section 7703(d) -- "any final order or decision" -- and the absence in the briefs and arguments of any in-depth discussion of section 7703(d) and its purpose. In order to vest its decision with an aura of consistency the majority not only closes the courthouse door on the fingers of individuals but slams it shut on OPM in 8347(d)(1) cases. Had it not, a reasonable reader of section 7703(d) would be astonished to find that discretionary review of these cases in this court is available to OPM, whereas an individual has no review.

While I readily admit that anomalies in this complex area abound, in my view the better approach is, as I explain below, to let stand the limited Scroggins-level review for individuals as well as the plain language of section 7703(d) pertaining to OPM review. This approach results in equal if not greater consistency than the majority's all-or-nothing stand, since the level of review OPM may receive in this court parallels that of the individual under Scroggins: both aim to catch the worst abuses of the administering agency. See S. REP. NO. 969 at 64, 1978 U.S. CODE CONG. & AD. NEWS at 2786.

Another anomaly resulting from the majority's position is that it results in denial of review to a class of persons -- "individual[s]" under section 8347(d)(1) -- broader than that granted under sections 7703 and 7701 -- "employee[s] or applicant[s] for employment." At least with the Scroggins approach, these "individual[s]" (presumably including at least beneficiaries of employees) receive some type of review, although less than the full 7703 review for "employee[s] or applicant[s] for employment." Anomalies exist either way, but I believe my approach results in less injustice.

Finally, the majority's result is at odds with the broad language of section 7701. Section 7701 covers "any action which is appealable to the Board under any law"; section 8347 fits within "any law." Since all section 7701 actions are reviewable by this court, a conflict arises, for which, unfortunately, the majority offers unsatisfactory explanation.

III.

Given the opposing yet, when viewed in isolation, reasonable results which obtain when one tackles this statutory construction problem beginning at each of the above three starting points, a thoughtful person might conclude that either result (jurisdiction or no jurisdiction) is proper. However, tipping the scales in favor of at least

some sort of review is, in my opinion, the law of the land that, absent clear and convincing evidence of congressional intent to preclude the important right to judicial review, review must be granted. Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975). When the Abbott Laboratories presumption of review is combined with the 1980 activities of Congress in amending section 8347(d), which Judge Davis has succinctly described in his dissent, and the overall appellate framework I have attempted to describe here, I am firmly persuaded that at a minimum Congress intended the Scroggins-level of review to apply to physical disability cases. For this court not only to hold, as the majority does, that section 7703 review does not apply here, but to backtrack and eliminate even the barest of Scroggins-type review, is an unnecessary abdication of our jurisdictional and statutory responsibilities. The majority's holding, totally barring review in these cases, will apply to all petitioners who would seek circuit court review for, under the Federal Courts Improvement Act, it is only this court to which they may now turn.7/

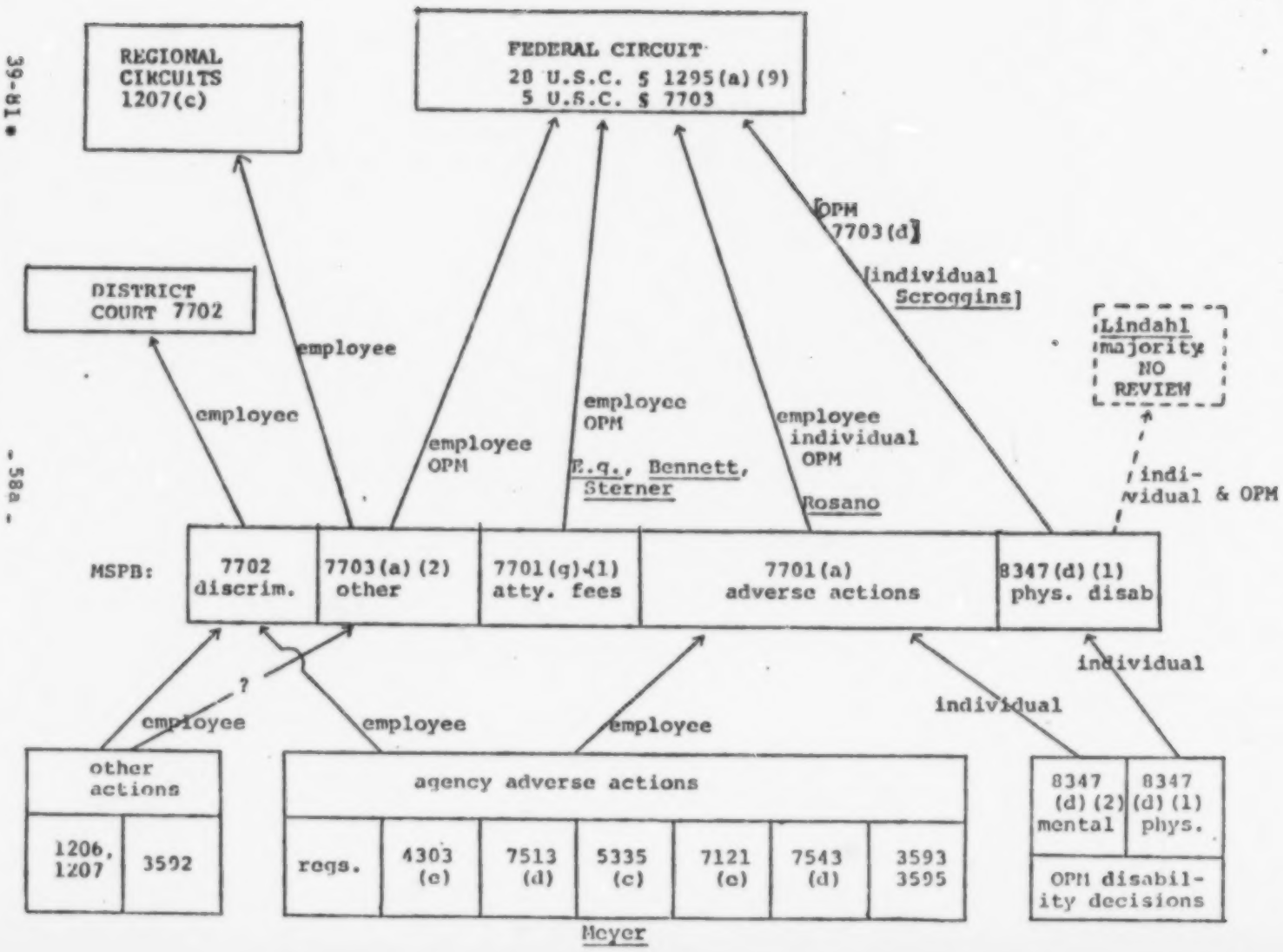
7/ Certainly courts should not strain for jurisdiction where it plainly does not exist, but that "canon" loses some strength where there is a long history of some jurisdiction. Furthermore, it should not be forgotten that, although the Federal Circuit is not "The Civil Service Court" any more than it is "The Public Contracts Court," or even "The Patent Court," Congress has assembled this bench of judges with broad and diverse backgrounds for the purpose.

IV.

I respectfully dissent, and presume to submit the following diagram of the appellate structure created by the Civil Service Reform Act and the Federal Courts Improvement Act, which harmonizes as much as possible all of the provisions of the acts. (To accommodate the majority's position one need only make the dashed lines solid and remove the Scroggins and OPM references.) This diagram is, of course, not the definitive word of this court in this complex area, but I hope that it may serve as a useful analytical tool for those entering this maze of appellate jurisdiction.

7/ (Cont'd)

among others, of establishing as much uniformity as practicable in the civil service area. That legislative policy would be defeated if we choose the path of least jurisdiction when there is no clear mandate to do so. Indeed, there is strong evidence in the legislative history of the Federal Courts Improvement Act that the presumption should be in favor of jurisdiction in those areas where Congress has expressly spoken for and created a court for the purpose of advancing uniformity.


REGIONAL CIRCUITS 1207(c)
FEDERAL CIRCUIT
28 U.S.C. § 1295(a)(9)
5 U.S.C. § 7703
DISTRICT COURT 7702
OPM 7703(d)
[individual Scroggins]
Lindahl majority NO REVIEW
employee
employee
employee OPM
employee OPM
E.g., Bennett, Sterner
employee individual OPM
Rosano
indi-vidual & OPM
MSPB:
7702 discrim.
7703(a)(2) other
7701(g)(1) atty. fees
7701(a) adverse actions
8347(d)(1) phys. disab
?
employee
employee
employee
individual
individual
other actions
1206, 1207
3592
agency adverse actions
regs.
4303 (e)
7513 (d)
5335 (c)
7121 (c)
7543 (d)
3593 3595
8347 (d)(2) mental
8347 (d)(1) phys.
OPM disability decisions
Meyer

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO FIELD OFFICE

WAYNE LINDAHL
v.
OFFICE OF PERSONNEL MANAGEMENT

DECISION NUMBER: SF8311810492
DATE: May 8, 1981

INTRODUCTION

By petition filed January 9, 1981, appellant Wayne Lindahl appealed a December 8, 1980, reconsideration decision from the Office of Personnel Management (OPM) which disallowed his application for disability retirement dated October 15, 1979. Appeal File, AF, Tabs 1, 8, and 11.

JURISDICTION

Since the appellant's application for disability retirement was initiated after January 11, 1979, the effective date of the Civil Service Reform Act of 1978, this appeal is covered by that Act. Pub. L. No. 95-454, 92 Stat. 1111 (1978), (codified in scattered sections of 5 U.S.C.).

A right of appeal from a reconsideration decision by OPM is granted by 5 U.S.C. 8347(d), which states, "An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board." This right of appeal is confirmed by OPM's own regulations, which provide that an appeal to this Board may be made after receipt of the reconsideration decision. 5 C.F.R. 831.1205 (45 Fed. Reg. 23032, April 8, 1980).

Accordingly, this appeal is within the jurisdiction of this Board.

ANALYSIS AND FINDINGS

The evidence upon which this decision is based was obtained from written submissions of both parties and testimony presented at a hearing held in San Francisco, California. OPM was advised of the date, time, and location by notice dated January 27, 1981. AF, Tab 26.

The basic statutory entitlement to a disability retirement is set forth in 5 U.S.C. 8337(a) as follows: "An employee who completes 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application or on application by his agency."

The term "disabled" is defined as "totally disabled ... for useful and efficient service in the grade or class of position last occupied by the employee or [illegible] because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled." 5 U.S.C. 8331(6).

At the time of his application, appellant had completed in excess of five (5) years of Federal civilian service covered by the Civil Service Retirement System.

OPM has made no finding or allegation that "vicious habits, intemperance or willful misconduct" played any role in appellant's condition, and this grounds for exclusion under 5 U.S.C. 8331(6) is given no consideration.

The sole substantive issue, therefore, is whether appellant was disabled within the meaning of 5 U.S.C. 8331(6).

Before addressing that issue, however, it is necessary to consider the matter of the degree of proof and which party has the burden of proof to establish the disability.

The cited Civil Service Reform Act (Reform Act) and the Board's regulations provide that in appeals before the Board, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence, 5 U.S.C. 7701(c)(1)(B) (1980), and 5 C.F.R. 1201.56(a)(iii)(1980), except in cases brought under 5 U.S.C. 4303, which covers actions based on unacceptable performance. 5 U.S.C. 7701(c)(1)(1980).

If these provisions were applied to an appeal such as the instant one, OPM would be required to establish, by a preponderance of the evidence, that appellant was not entitled to the disability retirement claimed.

However, the legislative history indicates that in enacting the burden of proof provision, Congress was concerned only with the Board's review of adverse actions concerning misconduct or unacceptable performance. There was no reference to disability retirement appeals. H.R. Rep. No. 95-1717, 95th Cong. 2nd Sess., 130-139 (1978), reprinted in Committee on Post Office and Civil Service, H.R. 95th Cong. 1st Sess., Vol. II, LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1040-1281 (1979).

Furthermore, there is no indication that the cited Board regulation on burden of proof was intended to do anything more than implement the provision of the statute.

The general rule of law requires the party asserting the existence of disputed facts to carry the burden of proof regarding those facts. That is, he or she must persuade the trier of fact that they are true. Williams v. Administrator of National Aeronautics and Space Administration, 463 F. 2d 1391, 1400 (C.C.P.A. 1972); Harper v. U.S., 448 F. 2d 36, 39 (5th Cir. 1971). In this appeal, the appellant has made a claim of disability, OPM has adjudicated that claim, and the appellant has appealed to this Board. If the burden of proof were placed on OPM, the mere presentation of a claim, without supporting evidence, would require OPM to undertake the burden of disproving the claim. Aside from being contrary to the general rule of law cited above, this result would run counter to the well settled principle that the party with the best knowledge of the facts, absent other considerations, should bear the burden of proof as to those facts. Bratton Corp. v. OSHRC, 590 F. 2d 273 (9th Cir. 1979); Old Ben Coal Corp. v. Interior Bd. of Mine Op. Apps., 523 F. 2d 25, 35, (7th Cir. 1975); cf., Mal Vecchio v. Bowers, 296 U.S. 280, 286 (1935).

In voluntary disability retirement cases, the appellant is significantly more likely than OPM to be aware of his or her health and its effect on job performance. Moreover, in similar cases where applicants seek disability benefits under the Social

Security Act, the court has held, "the appellant has the burden of establishing entitlement to disability benefits under the Social Security Act." Billings v. United States, 334 F. Supp. 1392 (D. Nebraska 1971). Also, in Turner v. Califano, 563 F. 2d 669, 670 (5th Cir. 1977), the court held, "the burden of proof in Social Security cases rests upon the claimant." Similarly, the burden of proof rests with the applicant for unemployment compensation, Department of Industrial Relations v. Tomlinson, 36 So. 2d 496 (Ala. App. 1948); for black lung benefits under the Federal Coal Mine Health & Safety Act, Brock v. Weinberger, 405 F. Supp. 1329 (D. Ct. Ark. 1975); and for worker's compensation benefits under the Longshoreme n's Compensation Act, Eschach v. Contractors, Pacific Naval Air Base, 181 F. 2d 860 (7th Cir. 1950).

Therefore, I conclude that the burden is on the appellant in this case to prove that he is entitled to the disability retirement payments which he seeks.

With reference to the standard or degree of proof which the appellant must meet, 5 U.S.C. 7701(c)(1)(B), as noted earlier, requires a preponderance of the evidence standard. The preponderance standard requires a showing of evidence "that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue...." William Parker v. Defense Logistics Agency, MSPB Order Docket No. PH0831930001 p. 2 (Feb. 19, 1980). In addition, the preponderance standard is the usual evidentiary standard in administrative proceedings. B. Manzines, J. Stein, J. Gruff, Administrative Law, 24-28 (1980).

In summary, appellant must prove his disability by a preponderance.

In its reconsideration decision of December 4, 1980, OPM briefly addressed appellant's application, the stated reasons given for the application, appellant's position description as a Police Officer with the Naval Support Activity, Mare Island, Vallejo, California, and the medical evidence. OPM's Medical Director, Dr. George M. Smith, M.D., concluded that appellant had "many subjective symptoms, but very few objective findings to uphold the symptomatology." Dr. Smith noted that appellant's "pulmonary function tests were normal" in concluding that total disability, as required, had not been shown. AF, Tab 4.

Regarding the type of evidence which may be considered in determining disability, I will address the following four categories: (1) the appellant's subjective complaints and evidence of related objective manifestations; (2) appellant's work history, including supervisory observations; (3) objective medical evidence; and (4) expert medical opinions. The weight to be given each of these categories is dependent upon the usual considerations inherent in the weighing of evidence in any individual case (e.g., reliability, relevance). There is no requirement in the relevant statutes, regulations, or rules that only a single type of evidence of a certain character, for example, "objective medical evidence" must be considered.

Concerning evidence of the type in category (1), above, appellant's application disclosed the following description of his disabilities:

> Accumulative, acute pulmonary (sic), chronic bronchitis--severe cough, chills, fever, total exhaustion, sweating, sensitive to hot-cold temperature changes physical exhaustion--tire very easily--lung pains heart attack--cannot recooperate (sic)

strength. Off work--Frequent Doctor's visits and medicine all the time congestion" (Original punctuation).

The stated date of total disability given by appellant was October 28, 1[illegible] AF, Tab 11.

Appellant did not augment these contentions by testimony. The record, however, contains a previous application for disability retirement, dated April 3, 1978, in which appellant cited the following disabilities: "Shortness of breath, pains in my chest, coughing, sneezing, frequent fever and chills. Infection in my lungs. Bronchitis, hypertention." AF, Tab 24.

Regarding work history, category (2), above, no direct evidence of the total amount of lost time due to illness was provided. However, testimony of appellant's supervisors was provided. The substance of their testimony was that appellant's personal physician Beverly Allen, M.D., had provided reports that concluded that appellant should not be assigned overtime and he was also precluded from performing the full range of his duties due to his bronchial condition which was exacerbated by exhaust fumes, dust from [illegible] blasting and smoke from cigarettes. Hearing Transcript, HT, pp. 39-43, 52-54, 73.

One of appellant's supervisor's, R. C. Hicam, Security Officer, testified that appellant had a "very poor attendance record" and had frequent sick leave. HT, p. 70. Another, L. J. Hodges, Chief of Police, noted that appellant frequently complained about irritants. However, Mr. Hodges pointed out that he never observed symptoms of irritation, but only heard appellant's complaints, for example, about smoke in the "squad room". HT, pp 57-58. The record did contain the note in the Supervisor Officer's Statement portion of the application that "when around persons smoking, (appellant) appeared to start coughing." AF, Tab 9.

Taken as a whole, however, the record disclosed a definite lack of evidence of observed symptoms of irritation such as coughing, sneezing, breathing difficulties, watering eyes, etc. or other observable manifestations of appellant's claimed ailments by co-workers and supervisors. I consider this lack of evidence to be of some weight when viewed in the light of medical reports described, below, since these persons were regularly with appellant during duty hours, and no reason has been established or even advanced to discount the statement of Mr. Hodges or to explain this want of objective corroboration.

Before turning to the categories (3) and (4), above, objective medical findings and medical opinion, I note that appellant has referred to his separation from his position by the Naval Support Activity, on October 5, 1980. The record reveals that his separation was proposed and effected for the reason that his "physical condition (had) disabled (him) to such an extent that (he was) unable to perform the full range of duties required....". AF, Tabs 7 and 9; Hearing Exhibit, HT, 1. Appellant's supervisors testified that this decision to separate appellant was based on reports of Dr. Allen which concluded that he could only perform limited not the full range of his duties because of his stated bronchial condition.

It should be noted, therefore, that appellant's supervisors did not conclude appellant could not do his duties because of their own personal observations. Rather their conclusions were based on physicians reports. HT pp. 40, 55-56, 69-70. A Superior Officer's Statement, a part of the disability application noted, "According to his physician, he was not allowed to climb stairs, walk excessively, stand for an extended period of time, come in contact with fumes or cigarette smoke". AF, Tab 8. (Emphasis added).

The Board has repeatedly made clear that a conclusion by the agency that an employee is not fit to continue satisfactory duty performance is not dispositive of the issue of whether he is totally disabled under 5 U.S.C. 8331(6) so as to be eligible for a disability annuity under 5 U.S.C. 8337 from OPM. Pace v. OPM, MSPB Order No. SF831L09015 (12/8/80); Cullerton v. OPM, MSPB Order No. CH831L09003S (3/17/81); Boyd v. OPM, MSPB Order No. SL831L09009S (3/17/81); Robinson v. OPM, MSPB Docket No. DC831L09014 (3/17/81), citing Polos v. United States, 421 F. 2d 385, 393 (Ct. Cl. 1980), and Piccone v. United States, 407 F. 2d 866, 872 (Ct. Cl. 1969).

The record contains several medical opinions and reports of medical findings. Those completely supportive of appellant's claim were provided by his physician Dr. Allen. Dr. Allen's most recent report of record was dated May 15, 1979. Dr. Allen stated that she had seen appellant on "innumerable occasions with his acute bronchitis" and there was "no doubt whatsoever in (her) mind that each of the attacks ... are (sic) in fact attacks of severe bronchitis". She concluded, "He has frequent uncontrollable coughs, in my opinion undoubtedly caused by pollutants in the air which he breathes .... He also has some psychological component in his suffering." She concluded that he was not capable of working at his position due to his condition, and the "ubiquitous nature" of pollutants in the work atmosphere. AF, Tab 6.

Dr. Allen's statement of September 25, 1979, submitted with the application at issue, provided a diagnosis of "chronic bronchitis," and concluded that appellant was permanently disabled. Under physical findings, Dr. Allen noted that appellant's "treadmill and cardiac x-rays were normal". AF, Tab 22.

Enclosed with her report were copies of records of appellant's hospitalization in January 1979. The Discharge Summary prepared by Dr. Allen showed "Physical Examination: Patient....has little to find". "Laboratory Data" identified no positive test or laboratory findings relative to bronchitis. AF, Tab 20. In a letter to the employing agency, dated June 20, 1979, Dr. Allen noted appellant had recurrent attacks of disabling bronchitis and her opinion that he was incapable of working. AF, Tab 21.

I have also considered Dr. Allen's earlier submitted reports including those transmitted with a previous application for disability retirement to OPM submitted on April 3, 1978. AF, Tab 24. This was denied by OPM on October 17, 1978. AF, Tab 23. This application was based on the claimed bronchitis.

Dr. Allen's report of physical findings noted recurrent episodes of bronchitis. Chest x-ray was "unremarkable except for slight tortuosity of the aorta." Pulmonary function studies were noted without conclusion as to abnormality or evidence of disability. AF, Tab 17. She concluded that appellant was disabled.

variety of environmental irritants to which he has been exposed, including asbestos.

From an objective standpoint, as the result of my examination and review of his films and pulmonary function tests, it would seem to me that his subjective symptoms are somewhat out of proportion to the objective findings, especially in a patient who has never smoked. His ventilation studies reveal a total vital capacity of 5100, which is normal. His FEV_1 is 4200 and the ration of FEV_1 to FVC is 87%, also well within normal limits. We can therefore, I believe, say that there is no evidence of either restrictive or obstructive disease at this time, which would seem to indicate to me that he has little if any interstitial disease from asbestos exposure.

It would seem to me that the most likely classification for his disability would be a chronic type of sensitivity bronchitis superimposed on a hereditary atopic [illegible] type. So far as I can determine, he has never been tried on corticosteroid therapy. As not J, I believe the possibility of minimal pleural asbestosis is very real.

Part of his disability at this time, I believe, is due to poor conditioning, since he is overweight and indulges in very little physical activity. (Emphasis added.)

I have also considered the medical findings of Gerald Levine, M.D., as stated in his report of April 10, 1978. I have considered his findings since they are pertinent to the claimed disabilities, are not significantly removed in time, and they provide objective data on matters addressed by Dr. Allen in her noted reports of 1977 and 1978. AF, Tab 27.

Regarding the relevant condition Dr. Levine noted the following:

> PHYSICAL EXAMINATION: He was a down, large white male with a frequent dry cough during the course of the interview. His blood pressure was 120/90 in the left arm sitting. His heart rate was 72 and regular. Respirations were 17 and unlabored. Head and Neck: The fundi were normal. The pupils were equal and reacted to light. There was no jaundice, pallor, cyanosis, cervical adenopathy, or thyromegaly. His throat was erythematous. The jugular venous pressure was not elevated. He was not using his accessory muscles of respiration. Chest: The lateral expansion was four inches. Percussion was resonant. The breath sounds were vesicular. There were no adventitious sounds. Cardiac: There was no cardiomegaly, murmurs, or gallops. Abdomen: There was no hepatosplenomegaly. Extremities: There was no clubbing, edema, or calf tenderness. The pedal

pulses were present but diminished. Neurological: Physiologically intact.

LABORATORY DATA: The laboratory data included a normal CBC with a hemoglobin of 17.7 gm.% and a hemoglobin of 49.8% with normal red blood cell indices. The white count was 6,000 with a normal differential. A urinalysis was normal. Serum electrolytes, glucose, and BUN were normal as was the remainder of the SMA 12 although the triglycerides nonfasting were minimally elevated to 156. A chest x-ray was interpreted as follows: "Parenchyma is clear. There is minimal diffuse bilateral pleural thickening. Heart is not enlarged. There is a tortuous ascending aorta reflecting perhaps hypertension. There is some elevation of the left diaphragm. No acute disease is identified." An electrocardiogram was within normal limits.

A pulmonary function study included normal static lung volumes with a vital capacity of 4.75 litres which (was) 95% of normal, a residual volume of 102%, a total lung capacity of 97%, and a functional residual capacity of 85%. The mechanics of breathing revealed mild airways obstruction with no significant post-bronchodilator response. The forced vital capacity rose from 5.24 litres before to 5.33 litres after bronchodilator. The forced expiratory volume in one second from 3.14 litres before to 3.01 litres after bronchodilator, and the forced expiratory volume in one second percent, the normal value being greater than 70%, was 60% before and 56% after bronchodilator. The maximal expiratory flow rate was 247 litres per minute before and 239 litres per minute after bronchodilator, the normal range being 432 ± 108 litres per minute. The maximal mid-expiratory flow rate was 2.64 litres per second before and 2.49 litres per second after bronchodilator, the normal range being 3.6 ± 1.1 litres per second. These reveal mild airways obstruction. The helium mixing time was normal excluding maldistribution of inspired air. The diffusion capacity was normal excluding emphysema or interstitial lung disease.

. . .

In my evaluation I had the distinct impression that this man was profoundly depressed. The physical examination for all intents and purposes was within normal limits. The laboratory testing consisted of this evidencing only some mild airways obstruction which could not conceivably account for the degree of problems the patient has described. I do not doubt that he may have recurrent upper respiratory infections, but there does not seem to be any significant underlying immunologic disorder to account for this. I do not feel he has any disability relating to his physical conditioning. He certainly does not have any pulmonary physiological disability. Attention paid to his depressive reaction may be rehabilitative. (Emphasis added.)

Reviewing the record evidence, I note that Dr. Allen has provided conclusions of disability based on her clinical observations of appellant. She described appellant's "uncontrollable coughs". In view of these conclusions it is significant that no such occurrences in the work place were reported by appellant, his co-workers, or supervisors. Reports of physical findings, tests, or other objectively verifiable medical evidence were not provided to support her observations. If it was the case that no such evidence is ever available in such a case, then a competent medical finding stating that conclusion was required but not provided.

Based on Dr. Epstein's report, it is apparent that such tests and other objective indicia of the disabling bronchial condition are susceptible of a[illegible] ailment. Dr. Epstein reviewed test and physical findings and noted "no evidence of either restrictive or obstructive disease" and that appellant's subjective symptoms were disproportionate to cited objective findings.

In light of the lack of evidence of observed symptoms by others and Dr. Epstein's conclusions supported as they were by the cited findings, I conclude that his conclusions are entitled to more weight than Dr. Allen's. In reaching this conclusion I am not unmindful of the length of time of patient relationship between Dr. Allen and appellant. I have also considered that Dr. Smith's opinion, although not based on a physical examination, was entitled to more weight since it was based on a professed review of the record available to that time.

I have strictly discounted Dr. Williams' opinion of appellant's condition in [illegible] 1977 regarding the chronic bronchitis, but conclude that the qualifying character of his conclusion, "probably disabled," in the absence of cited positive, objective physical findings, diminishes the weight to be accorded to it. Furthermore, Dr. Levine's conclusions based on his review of tests and stated data are consonant with those of Dr. Epstein, and provide persuasive rebuttal to Dr. Williams.

Having heard, read and considered the record evidence, I find that appellant has not established by a preponderance of the evidence that he has a disease or injury which renders him totally disabled for useful and efficient service in his last occupied position. Accordingly, I conclude that he is not entitled to disability retirement pursuant to 5 U.S.C. 8337.

DECISION

The December 4, 1980, decision of the Office of Personnel Management which denied appellant's application is hereby affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 12, 1981 unless a petition for review is filed with the Board within 30 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1717 H Street, N. W., Washington, D. C. 20419.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Under 5 USC 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board, provided the petition is filed no more than thirty (30) calendar days after receipt.

FOR THE BOARD:

PHILIP L. ARNOLD
PRESIDING OFFICIAL

United States of America
Office of Personnel Management
Washington, D C 20415

April 8, 1980

Wayne Lindahl
2685 Magee Avenue
San Pablo, CA 94806

CLAIM NUMBER
CSA 2 115 707
POSITION
Police Officer

Your application for retirement under the disability provisions of the Civil Service Retirement Law has not been approved because total disability for useful and efficient service in the above position is not shown.

A careful review and evaluation by the Office of Personnel Management's medical staff of all evidence submitted in your case fails to establish that you have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position from which you are seeking retirement. Since the retirement law does not authorize benefits based on partial disability, your application cannot be approved at this time.

If you believe that the action taken on your application is not proper, you may request reconsideration of our finding within 30 calendar days after the date you receive this letter. Any request you make should show your name and address (including ZIP code), the claim number shown above and the reason for the request for reconsideration. You may submit with your request any additional evidence which you think might support your request. Address your request for reconsideration to the address indicated below.

By reason of your separation you are entitled to annuity beginning when you reach age 62. You may choose to receive an immediate refund of all of your retirement deductions instead of annuity benefits at age 62. If you desire the refund you should complete an Application for Refund of Retirement Deductions, Standard Form 2802, at least 31 days before your 62nd birthday.

Office of Personnel Management
Chief, Medical Operations Branch
Washington, D.C. 20415

Sincerely yours,

Retirement Claims
Retirement Operations Branch

Enclosure

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF RETIREMENT, INSURANCE, AND OCCUPATIONAL HEALTH
WASHINGTON, D.C. 20415

March 21, 1980

C.S.C. Rivgg
CLAIM NUMBER
CSA 2 113 707
SOCIAL SECURITY ACCOUNT NUMBER
473-18-5184

Mare Island Naval Shipyard
Vallejo, California 94592

DISABILITY RETIREMENT NOT APPROVED

NAME (Last) (First) (Middle)	DATE OF BIRTH	POSITION
Lindahl Wayne NMN	7-2-25	Police Officer
DEPARTMENT OR AGENCY	**LOCATION**	
Naval Support Activity	Mare Island Naval Shipyard, Vallejo,CA 94592	

The above-named employee's application for annuity under the Civil Service Retirement System has been disallowed for the reason checked below:

1 ☐ Decision for disallowance is based on additional medical evidence from an authoritative source.

2 ☒ Medical disorder involved is not disqualifying for full performance of duties of the employee's position under qualifications standards.

3 ☐ Applicant did not become disabled during last position occupied.

(If your medical officer desires further information on the reason for disallowance checked above, he is invited to communicate directly with the Commission's responsible medical officer. Our medical officer will furnish him a full explanation of the reasons for rejection in relation to the civil service program.)

4 ☐ Applicant has less than 5 years creditable civilian service, the minimum required for title to annuity.

5 ☐ Dismissed at request of applicant.

6 ☐ Dismissed for lack of evidence because applicant did not report for medical examination.

7 ☐

CLAIMS DIVISION

BRI 44-39
JULY 1972

United States
Office of
Personnel Management Washington, D.C. 20415

In Reply Refer To Your Reference

Received on Dec 23-80 w.d.

CSA 2 115 707

Wayne Lindahl
2685 Magee Avenue
San Pablo, California 94806

DEC 4 1980

Reconsideration request of Wayne Lindahl
5USC 8331(6).8337

ederal Personnel Manual Supplement 831-1, Subchapter S10 sets out the conditions that must be met by an employee in order to be eligible for an immediate annuity because of disability retirement. One of these conditions is that an employee must, while employed subject to the retirement system, have become totally disabled for useful and efficient service in his or her position. To make this determination, the claim is reviewed with attention to the following considerations:

1. Documentation of a deficiency in service with respect to performance, conduct or attendance.
2. Documentation of a medical condition - disease or injury.
3. A relationship between the service deficiency and the medical condition such that the medical condition has caused the service deficiency.
4. The expected duration of the medical condition.
5. The incompatibility of the medical condition with either useful service in or retention in the position.

A determination of total disability is made when the information in the file indicates that there is a service deficiency of sufficient degree, caused by disease or injury which would preclude useful and efficient service by the employee.

The records show that your disability retirement application was signed on October 9, 1979. The objective medical evidence submitted in your case failed to establish that you were totally disabled within the meaning and intent of the civil service retirement regulations and thereupon the claim was disallowed. On March 21, 1980, you were sent notification that your claim was denied. You requested reconsideration of this action by letter dated May 15, 1980, which was accepted to initiate a review of your claim.

CSN 114-04-3
January 1980

The requirements of the last position occupied, that of Police Officer are noted. We have evaluated all of the information that was presented. The data includes:

1. Letter - Beverly G. Allan, M.D. - May 15, 1980
2. Report - Superior Officer - May 18, 1980
3. Letter - Ray C. Nieman - May 27, 1980

In your application, you gave reasons for requesting a disability retirement annuity as follows:

1. Acute pulmonary problems
2. chronic Bronchitis
3. severe cough
4. chills
5. fever
6. total exhaustion
7. tire very easily
8. lung pains
9. heart attack
10. cannot recuperate strength
11. off work frequently
12. sweating
13. sensitive to hot and cold temperature changes
14. physical exhaustion.

Your supervisor cites that according to the physician, you were not allowed to climb stairs, walk excessively, stand for extended time, come in contact with fumes or cigarette smoke.

You have many subjective symptoms but very few objective findings to uphold the symptomatology. Part of your disability at this time is due to poor conditioning since you are overweight and indulge in very little physical activity according to Dr. Frederick Epstein. Pulmonary function tests are normal.

While your condition is admittedly bothersome, there are no clinical findings which document a physical impairment incompatible with retention in your position or the fulfillment of your assigned duties.

We recognize that there may be discomforts and annoyances present; however, we lack objective medical findings to support a sustained condition of total disablement for your position held. There are no provisions in the disability retirement regulations for annuity payments for partial disability.

An analysis of all the facts and the total medical evidence in the file leads us to a conclusion that additional medical examinations are no indicated and allowance of your claim is not warranted.

Should you wish to initiate an appeal of this decision, mail it directly to: Regional Administrator, Merit System Protection Board
525 Market Street
24th Floor
San Francisco, California 94105

Along with the letter of appeal you should submit any further medical or other evidence to substantiate your claim.

We regret that the facts of the case do not allow us to give you a more favorable determination.

Sincerely yours,

George M. Smith, M.D.
Medical Director

DECISION

From the review of the entire claim file, we find the action of disallowance of your disability claim was proper. Therefore, the decision of disallowance of your application is sustained.

This becomes the final decision of the Office of Personnel Management. This decision may be appealed to the Merit Systems Protection Board within 20 calendar days of the day on which it is received.

Should you wish to initiate an appeal of this decision, mail it directly to :

Regional Administrator,
Merit Systems Protection Board
525 Market Street
24th Floor
San Francisco, California 94105

Along with the letter of appeal you should submit any further medical or other evidence to substantiate your claim.

We regret that the facts of the case do not allow us to give you a more favorable determination.

Sincerely yours,

George M. Smith, M.D.
Medical Director

Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises a right to participate in a proceeding before the Board, he shall do so early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply to, or by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and which shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board opens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding calendar year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

APPENDIX D

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Added Pub.L. 95-454, Title II, § 205, Oct. 13, 1978, 92 Stat. 1143.

§ 8347. Administration; regulations

(a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.

(b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The Office shall adjudicate all claims under this subchapter.

(c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.

(d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

(e) The Office shall fix the fees for examinations made under this subchapter by physicians or surgeons who are not medical officers of the United States. The fees and reasonable traveling and other expenses incurred in connection with the examinations are paid from appropriations for the cost of administering this subchapter.

(f) The Office shall select three actuaries, to be known as the Board of Actuaries of the Civil Service Retirement System. The Office shall fix the pay of the members of the Board, except members otherwise in the employ of the United States. The Board shall report annually on the actuarial status of the System and furnish its advice and opinion on matters referred to it by the Office. The

§ 1201.56 Burden and degree of proof, affirmative defenses.

(a) *Burden and degree of proof.* (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Substantial evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

(2) *Preponderance of the evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) *Harmful error:* Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

(d) *Moving forward.* In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

APPENDIX G

Documents, is attached to the application for retirement submitted direct to the Bureau of Retirement, Insurance, and Occupational Health.

(2) *Employee in the Washington, D.C. Metropolitan Area.* (a) With the employee's application for retirement, the following documents are submitted to the Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D.C. 20415:

(i) Statement of employee's superior officer, SF 2801–A.

(ii) Statement of the employee's attending physician, preferably on SF 2801–B.

(iii) Report of examination by a Federal medical officer (if adequate medical facilities are readily available within the employing agency), *or* statement that no medical facilities are available within the agency.

b. **Direct filing after separation of at least 31 days.** Regardless of place of employment, an employee separated more than 30 days may submit his or her application for retirement direct to the Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D.C. 20415, accompanied by a statement of his or her attending physician. The Commission will contact the agency for any necessary additional information.

S10–10. FILED-BY-AGENCY DISABILITY RETIREMENT PROCEDURES

a. **Procedural responsibilities of agency when it considers acting upon deficiencies in an employee's service caused by a possible health problem.** (1) *Procedures.* An agency should follow the procedures prescribed by the regulations if the deficiencies in an employee's service, conduct, or attendance are such that removal may be necessary to promote the efficiency of the service, or if the employee's behavior or physical condition is such that it presents a significant disruptive influence or risk to the safety of others in the work environment. These procedures are of two types: Those that are *required* and those that are *recommended* as good personnel practices. The required procedures must be observed in every case. The Civil Service Commission will remand to agencies without action any agency-filed disability retirement case which indicates lack of conformance with required procedures. Failure of an agency to follow recommended procedures will not be cause for remanding or, in itself, a basis for denial of the application. An employee has the right to be represented at any time during these procedures. Hereafter in this section, the word *employee* includes the concept of representative where appropriate, and all rights, notices, etc., are available to representatives.

(2) *Making preliminary decision.*

(a) The agency is required to make a preliminary determination that the employee's performance, attendance, or behavior is below the level of acceptability, and on the basis of management evidence, that a health problem exists which could account for the service deficiencies. Management evidence means information obtained from such readily available sources as supervisory observation of job performance, absence from duty, or knowledge of illness, accident, or hospitalization.

(b) It is recommended that supervisors and personnel officials consult informally with the agency medical officer to explore possible medical solutions to the employee's problems.

(3) *Establishing a prima facie case.* The agency is required to establish a prima facie case in *record* evidence that (a) the employee's service is not useful and efficient (based on performance, attendance, behavior, etc.) and (b) the apparent cause is a mental or physical illness or injury not of a transient nature. The prima facie case will document primarily deficiencies in the employee's service rather than his or her alleged illness or injury. Except where an issue of safety of life or property or an issue of security clearance can be decided only upon the basis of the state of physical or mental health of the employee, to be sufficient, the available evidence should be such that it will

warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement.

(4) *Conducting a counseling session*

(a) It is recommended that, if possible, the agency have a counseling session with the employee to discuss the problem and to inform the employee thoroughly of the advantages and disadvantages of the various alternatives open to him or her before any formal action is initiated. A transcript need not be made of this session. If a counseling session is not held, the reasons should be given in the record. One of the primary purposes of the counseling session is to explore with the employee the possibility of reassignment to another position. An agency should make a conscientious search and should consider the employee's potential value for retraining for a different type of work.

(b) The agencies are reminded that executive branch policy encourages maximum use of the services of the agency coordinators for the employment of the handicapped. Instructions pertaining to reassignment in lieu of disability retirement appear in FPM chapter 306, subchapter 8. The coordinator will also be able to provide information on vocational rehabilitation made available through the counselors from the various State agencies. The counselor from the State vocational rehabilitation agency can be useful to the employee and the agency in selective placement efforts because of his or her knowledge of disabilities and job requirements, and can make recommendations regarding vocational rehabilitation services. The agency may assist an employee in availing him or herself of the services offered by a vocational rehabilitation agency, but this assistance has no effect on any action taken under instructions in this supplement or related instructions appearing elsewhere in the FEDERAL PERSONNEL MANUAL.

(c) The agency should not overlook the possibilities of transfer of the employee to a position in another agency. An employee's failure to choose reassignment at this time should *not* be considered final. Offers should be held open, if possible, and any other opportunities that arise before the employee's separation should be explored.

(5) *Obtaining medical evidence*

(a) If the counseling session has not made an alternative course of action possible, the agency may direct the employee to report for a fitness-for-duty examination as instructed by the following paragraphs. If evidence already available is apparently sufficient (preferably in the judgment of a medical officer, particularly when a possible mental illness is indicated) to establish that the deficiencies in the employee's service are caused by disease or injury, such an examination would be unnecessary.

(b) When the agency has decided that available medical evidence is apparently inadequate, the employee's supervisor or other manager familiar with the employee's performance on the job must decide, with the assistance of any available medical advice, whether the possible health problem(s) affecting the employee's service can be evaluated by a general physical examination, an examination by a specialist in a physical disorder, or a psychiatric examination. If a general physical examination or an examination by a specialist in a physical disorder is indicated, the agency may order an appropriate fitness-for-duty examination, as follows:

(i) A written notice must be prepared to order the employee to report for the examination. This notice must inform the employee of the reasons for the examination. This notice must also provide instructions to the employee on how to participate in the selection of a medical examiner if he or she desires to do so. An employee has the right to be represented, and should be

so informed by this notice (see (c)(ii)*1* below).

(ii) If an employee objects to being examined and is unwilling to select a different medical examiner, the agency may consider bringing charges against the employee which may *include* a charge of refusing to report for an examination as directed.

(iii) When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner named by the agency to serve as background for his examination. Any information presented to the medical examiner is also made available to the employee or a physician designated by the employee in writing for this purpose.

(iv) The medical examiner will be asked to state his or her opinion on whether the employee should be given further testing or examination. Further examination may not be ordered unless recommended by the medical examiner.

(c) If the employee's supervisor or other manager familiar with the employee's performance on the job decides that the behavior of the employee has been such as to raise the possibility that the illness is mental or emotional, and recommends a psychiatric examination, or if a physical examination was made and the medical examiner recommends a psychiatric examination:

(i) An employee may not be ordered to report for a psychiatric examination unless a majority of a panel of at least three agency officials agree that the circumstances warrant such action.

(ii) If a majority of the agency panel agrees that a psychiatric examination is indicated, such an examination will be ordered as follows:

1. If a psychiatric examination is to be ordered, appointment of a representative is required. An employee may name a representative at any time, but if he or she fails to name one voluntarily, the agency should urge the employee to do so before ordering a fitness-for-duty psychiatric examination and offer him or her assistance by naming the kinds of persons who make good representatives. If the employee does not name a representative at the agency's urging, the agency must appoint a representative who will receive copies of all notices, determinations, decisions, or other written communications issued to the employee under these procedures.

2. A written notice to the employee must be prepared to order the examination as above.

3. If the employee objects to the medical examiner named by the agency, he or she will be asked to submit the names of three to five board-certified psychiatrists to whom the employee would be willing to report. The agency will then select a medical examiner from the list and arrange an examination.

4. When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner to serve as background for his or her examination. The agency will make available only to a licensed physician, designated in writing for that purpose by the employee or his or her representative, a full report of the medical evidence in his or her file including a copy of the reported behavior irregularities or manifestations of unsatisfactory service.

5. If the employee refuses to cooperate altogether, the agency must document all instances of alleged behavioral deficiencies on which the decision to order a psychiatric examination was based. This lay evidence may serve as the basis for an agency-filed application for disability retire-

ment in the case of an emotionally disturbed employee.

(d) If the agency selects a representative, it may choose a family member, union officer, veteran's service officer, or if no other representative is available, an employee of the agency. An employee should be chosen as representative only as a last resort and should not be an employee under the jurisdiction of the supervisor initiating the request for disability retirement. An ideal agency panel to consider whether a psychiatric examination should be ordered would include an immediate *supervisor or manager, a personnel official, and an agency medical officer if one is available*, but other officials may be used when necessary. Members of such a panel do not have to actually hold a meeting to reach a decision on the file.

(6) *Duty status.* The agency is required to retain an employee in an active-duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his or her consent, or without consent when the circumstances are such that retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay must be effected in accordance with applicable laws, Executive Orders, and regulations.

(7) *Making tentative determination.* On the basis of all available evidence, the agency is required to decide whether deficiencies in the employee's service are caused by illness or injury. If not, adverse action procedures may be instituted if warranted. If the agency decides that deficiencies in the employee's service (performance, attendance, behavior, etc.) are established and are caused by disease or injury, it then must notify the employee of this tentative determination that he or she meets all requirements to be retired for disability. The notice must:

(a) Be in writing;

(b) Give reasons for tentative determinations;[1]

(c) Include an explanation of the employee's right to reply orally, or in writing, or both, and to submit affidavits or documentary evidence or both, within a specific reasonable time, but no less than 15 calendar days; instructions for submitting a reply; and an explanation of the right to representation, if a representative has not already been designated;

(d) Advise the employee of the right (or that of his or her physician or representative, or both) to review the case file and to obtain copies of the medical findings at no expense; and

(e) Name the official designated to receive employee's oral reply.

(8) *Answering tentative determination.* If the employee answers the agency notice of tentative determination, all documentary evidence (i.e., medical reports, hospital records, affidavits, or statements) offered by the employee or his or her representative must be received, considered, and included in the case file. An oral reply to the previously designated agency official must be summarized in writing and included in the case file. An additional copy, approved or supplemented by the employee, must be included in the case file. The employee may amend his or her copy of the summary or submit correction or supplementation within five calendar days. The designated agency official may make or recommend the decision

[1] Where a prudent physician would hesitate to inform the employee fully of the details of his or her physical or mental condition, details of the medical evidence will not be given to the employee, but must be given only to a licensed physician designated in writing for that purpose by the employee or by a designated representative. Medical evidence will be given to the designated licensed physician with the understanding that he or she may use his or her own professional judgment in deciding how much information to disclose to the patient or the patient's representative. Rather than exercise discretion, an agency may in all cases give the medical evidence only to a licensed physician.

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

IN REPLY REFER TO
02C:CB:jlf
12752
02C/213
4 SEP 1979

From: Security Officer
To: Wayne (ROAN) Lindahl, Police Officer, Employee Number 479-16-5184

Subj: Advance Notice of Proposed Separation - Disability

Ref: (a) FPM Chapter 752
(b) FPM Supplement 752
(c) FPM Chapter 306
(d) FPM Chapter 339

Encl: (1) Copy of your Position Description Number 78-31-7/43

1. Nature of Action. This is to inform you that it is proposed to separate you from employment at this Activity in accordance with reference (a) through (d). This action is being proposed because your physical condition has disabled you to such an extent that you are unable to perform the full range of duties required of your position as a Police Officer.

2. Effective Date. Your proposed separation, if found warranted, will not be effected before a notice period of thirty (30) full calendar days has expired. The notice period begins the day following your receipt of this notice.

3. Reason for Action. The specific facts and reasons supporting this proposed separation are as follows:

a. The full range of duties required to be performed by you as a Police Officer are contained in enclosure (1).

b. On 26 June 1979 your private physician, Dr. Beverley C. Allan wrote a statement certifying you have recurrent attacks of disabling bronchitis and you exhibit extreme irritability to your bronchial tree when you are subjected to pollutants or various other irritants. She went on to list the irritants which include vegetable dusts of various kinds, paint fumes, glue, solvents, strong acid fumes, tobacco smoke, and exhaust fumes. She added, it continues to be her opinion that because of the ubiquitous nature of these pollutants in the work atmosphere you are incapable of working. Dr. Allan further stated you were to work no overtime and no heavy exertion.

c. Dr. J. P. Williams of the Mare Island Naval Shipyard Industrial Dispensary has evaluated your physical qualifications to effectively perform the full range of duties as a Police Officer. Your capacity to perform these duties was found to be as follows:

02C:C3:jlf
12752
Ser 02C/213

4 SEP 1979

Environmental and Functional Factors

No capacity - Usual overtime work, exhaust fumes, paint fumes, dust, silica, asbestos, fumes, smoke or gases, and solvents (degreasing agents).

Partial capacity - Moderate lifting 15-44 lbs. and moderate carrying 15-44 lbs.

d. Because of your physical condition, it is not possible to assign you to the full range of duties required of a Police Officer at this Activity.

e. Since you occupy a position which provides continuing services around the clock, it is not possible for this Activity to permit the position to remain unfilled.

f. Placement in another position in the Activity has been considered; however, there is no vacant position for which you are technically and physically qualified in which you can be placed.

4. Reply. You may reply orally and in writing to this Advance Notice of Proposed Separation - Disability and you may furnish affidavits in support of your reply. In addition, you are entitled to be represented by an attorney or other representative. Your response and any relevant material must be submitted not later than ten (10) calendar days from the date of this advance notice and shall be addressed to the Security Officer, Naval Support Activity, Mare Island, Vallejo, California 94592. Full consideration will be given to any reply you may make. The referenced material which supports this advance notice may be reviewed in the Personnel Office, Code 02C, Building 851. You will be allowed a maximum period of four (4) hours of official time to review this material.

RAY C. NIEMAN

I HEREBY CERTIFY RECEIPT OF ORIGINAL CORRESPONDENCE ON aug 5-79 (Date)

Wayne Lindahl (Name) 479185184 (Employee Number)

2

PHYSICIAN'S STATEMENT

FOR EMPLOYEE DISABILITY RETIREMENT PURPOSES
CIVIL SERVICE RETIREMENT SYSTEM

PART A—TO BE COMPLETED BY APPLICANT

INSTRUCTIONS 1. Complete Part A and give this form to your physician. He should complete Part B and mail it to the address you furnish in Item 9, below.
2. As an applicant, you are responsible for paying any expense incurred in completing this form.

1. PRINT OR TYPE FULL NAME (Last, First, Middle)	2. DATE OF BIRTH (Mo., Day, Yr.)	3. SOCIAL SECURITY ACCOUNT NUMBER
LINDAHL, Wayne (NMN)	7-2-26	479-18-5184

4. ADDRESS (Including ZIP Code)	5. TELEPHONE NUMBER (Including Area Code)
2685 Magee Ave. San Pablo, CA 94806	(415)758-9521

6. TITLE OF FEDERAL (OR D.C.) GOVERNMENT POSITION OCCUPIED AND BRIEF DESCRIPTION OF DUTIES

Police Officer, GS-083-5

See attached Position Description

7. BRIEFLY DESCRIBE YOUR DISABILITIES, STATE WHEN INCURRED, AND HOW THEY INTERFERE WITH PERFORMANCE OF THE DUTIES OF YOUR POSITION

Since October 1976 my private physician diagnosed a state of debilitating bronchitis which has been getting worse through the past 3 years. Because they are recurrent and debilitating it is now effecting the performance of my duties as a Police Officer

The physician has stated that it is job-irritated and will continue to become worse.

Because of the stress and atmosphere involved in job area the doctor has recommended that I retire.

8. RELEASE OF MEDICAL INFORMATION — I authorize the release of this statement and related medical information to my employing agency and the U.S. Civil Service Commission.

SIGNATURE: Wayne Lindahl — DATE: Sept. 6-1979

9. IN SPACE BELOW, ENTER THE EXACT NAME AND ADDRESS (INCLUDING ZIP CODE) OF YOUR EMPLOYING OFFICE.

ADDRESS TO WHICH PHYSICIAN SENDS STATEMENT ➡

Mare Island Naval Shipyard-Retirement Section
Vallejo, California 94592

PART B—TO BE COMPLETED BY PHYSICIAN

INSTRUCTIONS 1. Report in detail the clinical symptoms and findings upon which your diagnosis and conclusions are based. A complete and objective report may permit a decision on the claim for disability without need for further examination and inconvenience to the applicant.
2. Send the completed form to the office named by the applicant in Item 9, Part A. Please mark envelope "Disability Retirement-Privileged-Private."

MEDICAL HISTORY

1. HOW LONG HAS APPLICANT BEEN UNDER YOUR PROFESSIONAL CARE FOR THE INDICATED DISABILITY? (Give date)	2. WHEN DID YOU LAST SEE THE APPLICANT FOR EXAMINATION OR TREATMENT? (Give date)
October of 1976	9/5/79

3. IF APPLICANT IS CURRENTLY HOSPITALIZED OR HAS BEEN HOSPITALIZED RECENTLY, PLEASE FURNISH:

NAME AND ADDRESS (INCLUDING ZIP CODE) OF HOSPITAL OR OTHER MEDICAL FACILITY	DATE OF DISCHARGE	DATE OF ADMISSION
Kaiser Hospital 1330 Cutting Blvd. Richmond, Calif. 94801	2/1/79	1/23/79

PLEASE ATTACH SUMMARY REPORT OF HOSPITALIZATION OR ABSTRACT OF HOSPITAL RECORDS

PHYSICIAN: PLEASE COMPLETE OTHER SIDE OF THIS STATEMENT ALSO

2801-304

Standard Form 2801-B
U.S. Civil Service Commission
July 1972
FPM Supplement 831-1

APPLICATION FOR RETIREMENT
CIVIL SERVICE RETIREMENT SYSTEM

(USE ONLY IF SEPARATED ON OR AFTER OCTOBER 20, 1969)

To Avoid Delay—1. Read Information Carefully; 2. Complete Application in Full; 3. Typewrite or Print in Ink

A. IDENTIFYING INFORMATION

1. NAME (Last) (First) (Middle)	2. LIST ALL OTHER NAMES YOU HAVE USED
LINDAHL WAYNE (NMN)	NONE

3. ADDRESS (Including ZIP code)	4. PHONE NUMBER (Including Area Code)	5. DATE OF BIRTH (Month) (Day) (Year)	6. SOCIAL SECURITY ACCOUNT NUMBER
2685 MAGEE AVE. SAN PABLO, CA. 94806	415 7589521	July 2 1926	479 18 5184

7A. ARE YOU A CITIZEN OF THE UNITED STATES OF AMERICA?	7B. IF "NO", OF WHAT COUNTRY ARE YOU A CITIZEN?
☒ YES ☐ NO	

8A. ARE YOU MARRIED ☒ YES ☐ NO	8B. IF "YES" GIVE THE FOLLOWING INFORMATION			
WIFE'S OR HUSBAND'S NAME (First) (Middle)	HER (OR HIS) BIRTH DATE (Month) (Day) (Year)	HER (OR HIS) SOCIAL SECURITY ACCOUNT NUMBER	DATE OF MARRIAGE (Month) (Day) (Year)	PLACE OF MARRIAGE (City) (State)	MARRIAGE PERFORMED BY ☒ CLERGYMAN OR ☐ OTHER (Specify)
MARY Lou	MARCH 3 1928	546361728	Dec. 28 1950	RICHMOND, CALIF.	

9A. DO YOU HAVE ANY UNMARRIED CHILDREN UNDER AGE 22 (Or over age 22 and incapable of self support because of a disability incurred before age 18)? ☐ YES ☒ NO

9B. IF "YES" LIST NAME AND DATE OF BIRTH OF EACH CHILD. WRITE THE WORD "DISABLED" AFTER CHILD'S NAME WHERE APPLICABLE

CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)	CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)

B. CIVILIAN AND MILITARY SERVICE

1. DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION, AND ADDRESS, INCLUDING ZIP CODE	2. DATE OF FINAL SEPARATION (Month) (Day) (Year)	3. APPROXIMATE YEARS OF FEDERAL SERVICE CIVILIAN / MILITARY
Naval Supply Activity Mincy Dept, Vallejo CA 94592 Bldg 851 -02- Code [illegible] Patrol Branch	Oct. 5 1979	12 YRS / 7 YRS 6 MOS

4. TITLE OF LAST POSITION: POLICE OFFICER

5. DO YOU HAVE FEDERAL EMPLOYEES GROUP LIFE INSURANCE?	6. IF YOU HAVE REGULAR LIFE INSURANCE, DO YOU ALSO HAVE OPTIONAL LIFE INSURANCE?	7A. HAVE YOU BEEN ENROLLED IN A PLAN UNDER THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM SINCE YOUR FIRST OPPORTUNITY TO ENROLL OR FOR AT LEAST FIVE YEARS IMMEDIATELY BEFORE YOUR RETIREMENT?	7B. IF "YES" PLEASE LIST YOUR CURRENT: CARRIER CONTROL NUMBER	ENROLLMENT CODE NUMBER
☒ YES ☐ NO	☐ YES ☒ NO	☒ YES ☐ NO	30-159322	F-1

8. COMPLETE THE SCHEDULE BELOW IF YOU HAVE PERFORMED ACTIVE DUTY THAT TERMINATED UNDER HONORABLE CONDITIONS IN ANY OF THE FOLLOWING SERVICES (A) ARMY, NAVY, MARINE CORPS, AIR FORCE, OR COAST GUARD OF THE UNITED STATES OR (B) REGULAR CORPS OR RESERVE CORPS OF THE PUBLIC HEALTH SERVICE AFTER JUNE 30, 1960, OR (C) AS A COMMISSIONED OFFICER OF THE COAST AND GEODETIC SURVEY AFTER JUNE 30, 1961, OR (D) AS A COMMISSIONED OFFICER OF THE ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION. ATTACH A COPY OF YOUR DISCHARGE CERTIFICATE OR OTHER CERTIFICATE OF ACTIVE MILITARY SERVICE, IF AVAILABLE

BRANCH OF SERVICE	SERIAL NUMBER	DATE OF ENTRANCE ON ACTIVE DUTY	DATE OF SEPARATION FROM ACTIVE DUTY	LAST GRADE OR RANK	ORGANIZATION AT DISCHARGE (Div., Regt., Co., etc.)
U.S. NAVY	957 86 36	NOV 14-44	APR 6-46	SEAMAN 1st CLASS	USM 234
U.S. NAVY	957 86 36	OCT. 28 47	OCT 26-50	FIREMAN 1st CLASS	FA. 965 FLT. CAR
U.S. NAVY	957 86 36	27 OCT. 1950	DEC 16 1953	ME 2nd CLASS	NAV HOSP. MARTINEZ

9A. ARE YOU A MILITARY RESERVIST (Either Active or Inactive)?	9B. ARE YOU IN RECEIPT OF OR HAVE YOU EVER APPLIED FOR MILITARY RETIRED PAY? (Retired pay does not include V.A. pensions or compensation.)	9C. IF "YES" WERE YOU RETIRED FROM A RESERVE COMPONENT UNDER CHAPTER 67, TITLE 10, USC? (Formerly Title III, Public Law 90-010)
☐ YES ☒ NO	☐ YES ☒ NO	☐ YES ☐ NO

C. DISABILITY INFORMATION (Only Applicants for Total Disability Retirement Will Complete This Part)

1. BRIEFLY DESCRIBE YOUR DISABILITIES, STATE WHEN OCCURRED, AND HOW THEY INTERFERE WITH PERFORMANCE OF THE DUTIES OF YOUR POSITION. (ATTACH ADDITIONAL COMMENTS ON PLAIN SHEET OF PAPER, IF NECESSARY.) ALSO, STATE MONTH AND YEAR IN WHICH YOU BECAME TOTALLY DISABLED. CHRONIC NO 2. Bronchitis Accumulative Pulmonary Sensitivetemperange Tirednt. Exhaustion-Tc Lungs Bronchial Pain — Congestion of Sick on annual and sick leave Exhausted Out of Breath Heart attack Walking and Bing Physical Exhaustion Forms attached

D. OTHER CLAIM INFORMATION

10A. HAVE YOU EVER RECEIVED OR MADE APPLICATION FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT?	10B. IF "YES" STATE THE NUMBER OF YOUR COMPENSATION CLAIM AND THE PERIOD FOR WHICH YOU RECEIVED COMPENSATION. CLAIM NUMBER: A13505919 FROM (Mo.) (Day) (Year) TO (Mo.) (Day) (Year): under Adjudication
☒ YES ☐ NO	
11A. HAVE YOU PREVIOUSLY FILED ANY APPLICATION UNDER THE CIVIL SERVICE RETIREMENT SYSTEM, INCLUDING APPLICATION FOR RETIREMENT, REFUND, DEPOSIT OR REDEPOSIT, OR VOLUNTARY CONTRIBUTIONS? ☒ YES ☐ NO	11B. IF "YES" INDICATE THE TYPE(S) OF APPLICATION AND GIVE THE CLAIM NUMBER(S) IF KNOWN: ☒ RETIREMENT ☐ DEPOSIT OR REDEPOSIT ☐ REFUND ☐ VOLUNTARY CONTRIBUTIONS; CLAIM NUMBER(S): CSA 2115267
12A. DO YOU HAVE LIFE INSURANCE THROUGH A FORMER EMPLOYEE BENEFICIAL ASSOCIATION FOR WHICH YOU NOW PAY PREMIUMS TO THE CIVIL SERVICE COMMISSION? ☐ YES ☒ NO	12B. IF "YES" GIVE YOUR ACCOUNT NUMBER:
13A. HAVE YOU EVER BEEN EMPLOYED UNDER ANOTHER RETIREMENT SYSTEM FOR FEDERAL OR DISTRICT OF COLUMBIA EMPLOYEES? ☐ YES ☒ NO	13B. IF "YES" GIVE THE NAME OF THE OTHER RETIREMENT SYSTEM:

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

IN REPLY REFER TO
02C:CB:jlf
12752
Ser 02C/227
17 SEP 1979

From: Commanding Officer
To: Wayne (NMN) Lindahl, Police Officer, Employee Number 479-10-3184

Subj: Notice of Decision to Effect Separation - Disability

Ref: (a) FPM 752
(b) FPM 339

Encl: (1) Copy of Advance Notice of Proposed Separation - Disability 02C:CB:jlf 12752 02C/213 of 4 Sep 79
(2) Appeal Rights

1. Decision. In accordance with references (a) and (b), you are hereby notified of my decision to effect your separation from employment at this Activity.

2. Effective Date. This separation will be effected on 5-October-1979.

3. Reason for Action. This separation is being effected for your inability to perform the full range of duties of your rating, Police Officer, because of physical disability.

4. Restatement of Reason. The reason upon which this separation action is based is restated in enclosure (1).

5. Findings in Review of Reason. Enclosure (1) notified you of your right to reply personally and in writing to the Advance Notice of Proposed Separation - Disability and of your right to furnish affidavits in support of your reply.

A thorough review has been made of the reason for this action as contained in enclosure (1). After careful consideration of all available evidence, I find that the reason for this action is fully supported and sustained, and your separation is warranted. Since you did not reply, my decision is based on evidence of record.

6. Clearance. Your identification badge and all government tools and equipment charged to you must be returned and a clearance slip completed before any final monies due you may be issued.

7. Appeal Rights. Your rights to appeal this decision are contained in enclosure (2).

J. K. MUNNELEY

APPEAL RIGHTS

You may appeal at any time after receipt of this decision but not later than twenty (20) calendar days after the effective date of the action. Your right of appeal is as follows:

You may appeal to the Merit Systems Protection Board (MSPB), San Francisco Field Office, 525 Market Street, San Francisco, California 94105. The appeal shall be in writing and shall set forth your reasons for contesting the adverse action, with such proof and pertinent documents as you are able to submit. You should also indicate whether or not a hearing is desired. The attached form is provided for your convenience however, you are not required to utilize the form.

The decision of MSPB is final. However, either party to the appeal may petition MSPB to reopen and reconsider the decision.

If you have questions concerning your appeal rights and the appeal procedure, you should contact Carolyn Biddinger, Code 02C, extension 2122 or 4417.

ENCLOSURE 1 2